89-353

No. _____

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In The

Supreme Court of the United States

October Term, 1989

JENNIE SANCHEZ, et al.,

Petitioners,

v.

WILLIAM BOND, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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August 28, 1989

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QUESTIONS PRESENTED

Although geographically insular Hispanic voters comprise 36% of the voting age population of Saguache County, Colorado, and although no Hispanic has ever been elected to office in a contested county-wide election, the Tenth Circuit held below that the County's at-large system of electing commissioners for the Saguache County governing board did not violate Section 2 of the Voting Rights Act because the Hispanic community was not politically cohesive, and because Anglo bloc voting did not necessarily defeat the Hispanics' preferred candidates. Two questions are presented.

1. May petitioners' unrebutted voting analyses proving statistically significant racially polarized voting in nine out of ten elections in which Hispanic candidates were opposed by Anglos, during the course of a decade, result in a holding of no political cohesion within the meaning of Section 2 of the Voting Rights Act based solely on the anecdotal testimony of one lay witness for respondents, contrary to this Court's teachings in *Thornburg v. Gingles*, and contrary to the teachings of all Courts of Appeals which have addressed this issue?

2. May petitioners' same unrebutted proof of statistically significant racial polarization, together with continual Hispanic electoral defeat, result in a holding under Section 2 of the Voting Rights Act that the Hispanics' preferred candidates were not necessarily defeated by Anglo bloc voting based solely on the election more than twenty years ago of three unopposed Hispanic candidates and on the election of Anglo Democrats, again contrary to this Court's teachings in *Thornburg v. Gingles*, and contrary to the teachings of all Courts of Appeals which have addressed similar issues?

LIST OF ALL PARTIES

JENNIE SANCHEZ, Plaintiff
STELLA SANCHEZ, Plaintiff
ADELINE SANCHEZ, Plaintiff
DORA TRUJILLO, Plaintiff
CHARLES JARAMILLO, Plaintiff
SAGUACHE COUNTY, COLORADO, Defendant
MARY MOORE, Defendant
HAROLD PONT FREEL, Defendant
KEITH EDWARDS, Defendant
CHUCK GRANT, Defendant
WILLIAM BOND, Defendant
CECIL HALL, Defendant
JOHN PRICE, Defendant
ROBERT FELMLEE, Defendant

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No. _____

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October Term, 1989

JENNIE SANCHEZ, et al.,

Petitioners,

v.

WILLIAM BOND, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, Jennie Sanchez, et al., pray that a Writ of Certiorari be issued to review the decision in this case of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, reported at 875 F.2d 1488 (10th Cir. 1989), is attached hereto as Appendix A, App. 1-20. The unreported oral opinion of the United States District

Court for the District of Colorado is attached hereto as Appendix B, App. 21-33.

JURISDICTION

The judgment of the Court of Appeals was entered on May 30, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. Sec. 1973, Section 2 of the Voting Rights Act of 1965, as amended, provides:

> (a) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected

> to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. Sec. 1973b(f)(2), Section 4 of the Voting Rights Act of 1965, provides, in pertinent part:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

STATEMENT OF THE CASE

This case involves a challenge by Mexican American[1] voters of Saguache County, Colorado to the at-large election system used to elect commissioners for the Saguache County governing board. The case was filed under Section 2 of the Voting Rights Act, 42 U.S.C. Sec. 1973 (as amended). Jurisdiction was founded on 28 U.S.C. Secs. 1331, 1343 (3) and (4) and 1344 and 42 U.S.C. Sec. 1973.

Saguache County is a rural county in south-central Colorado. (App. 1) The County stretches over 3000 square miles and has a population of just under 4000 persons. (App. 1-2) Approximately 41% of the population and 36% of the voting age population is Mexican American. (App.

[1] "Mexican American" was used in the District Court to mean persons of Spanish origin. The term is used interchangeably with "Chicano", "Hispanic" and "Spanish-surnamed".

2) The Mexican American population is highly concentrated, primarily in the town of Center. (Tr. p. 30)[2] The District Court found the Mexican American community to be geographically insular and sufficiently concentrated to create a majority in a single member district. (App. 28).

The Saguache County governing board is composed of three commissioners, each of whom must reside in a distinct residency district. (App. 3) Elections, both for nomination in party primaries and for election in partisan general elections, are county-wide, at-large elections. (*Id.*) Elections are staggered, and each position is numbered. (Tr. pp. 271-72)

No Mexican American has won a contested election in a county-wide election in Saguache County. (App. 5) No Mexican American has ever won election to the Saguache County governing board. (App. 5) Three Mexican Americans won election to county-wide positions in uncontested, unopposed elections. (App. 5) Those elections occurred more than 20 years ago. (Pl.'s Exh. 34) Several Anglo Democrats have won election to county-wide positions and Anglo Democrats have won election to the Saguache County governing board. (App. 5)

Petitioners, statistical expert examined every election – ten elections – in which Mexican Americans were opposed by Anglos, between 1976 and 1986 in county-wide elections for which data was available. (Tr. pp. 280-81; App. 4) Two results were noted. First, Hispanics

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[2] "Tr. p." refers to Trial Transcript; "C.R." refers to Court Docket; "Pl.'s Exh." refers to Plaintiffs' Exhibits at trial; and "Def.'s Exh." refers to the Defendants' Exhibits at trial.

were politically cohesive, in that they generally vote as a bloc for the Hispanic candidate. (Tr. p. 289) Second, Anglos vote as a bloc and vote differently from Hispanics. (Tr. p. 298) The expert concluded that nine of the races were highly polarized and that Anglos voted as a bloc systematically to defeat Hispanic candidates. (App. 4) Respondents' expert, while not disputing that Mexican Americans voted as a bloc and differently from Anglos, attributed the polarization to political affiliation. (App. 4) The respondents also presented a Mexican American resident of Saguache County who opined that Mexican Americans were varied in their political thoughts and consisted of various politically distinct groups. (App. 11) Finally, one of the respondents, an Anglo Republican, testified he had received a great deal of support from Mexican American voters. (App. 4)

The District Court found a pervasive history of discrimination against Mexican Americans in Saguache County that continues to this date. (App. 22-23) Moreover, Mexican Americans continue to suffer from the effects of historical discrimination in the areas of education, employment and income. (Pl.'s Exhs. 15, 18 and 19; Tr. pp. 299-305)

The at-large election of County Commissioners in Saguache County was challenged in an action commenced by petitioners on March 27, 1985. (C.R. Plaintiff's Original Complaint) Trial was held from November 16, 1987 until November 20, 1987. On November 20, 1987 the District Court issued its bench ruling dismissing petitioners' complaint. Initially, the District Court ruled that a clear showing of historical discrimination against Hispanics, that continues to the present, was made. (App.

22-23) The District Court also acknowledged that petitioners, expert, Dr. Brischetto employed an appropriate statistical methodology and that Dr. Ellis, respondent's expert, used a flawed statistical methodology to analyze elections. (App. 23) However, the District Court focused on the election of three Anglo Democrats and the election of unopposed Hispanic candidates to hold that Anglos do not vote as a bloc to defeat minority preferred candidates (App. 24, 28).[3] The District Court also held, based on the testimony of county resident Gomez that Hispanics were divided into two or more groups, that Hispanics were not politically cohesive (App. 28).[4] Finally, the District Court found that Hispanics did not have less opportunity to participate in the political process explaining:

> Not with the power they've exerted, *not as close as they've come to electing commissioners*. They exert a lot of power.

(App. 28) (emphasis added).

The Tenth Circuit affirmed the legal conclusions of the District Court on May 30, 1989. (App. A)

REASONS FOR GRANTING THE WRIT

This Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), construed the intent of Congress for successfully maintaining an action pursuant to Section 2 of the Voting

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[3] The District Court concluded that Anglos vote as a bloc "in the area of Republican candidates." (App. 28)

[4] Yet, the District Court held that Hispanics "controlled" the Democratic Party. (App. 24)

Rights Act, 42 U.S.C. Sec. 1973 (as amended). According to *Thornburg*, in establishing a Section 2 violation, the key issue is whether a majority bloc vote usually defeats the "candidates supported by a politically cohesive, geographically insular minority group." 478 U.S. at 49. The Court noted that resolution of this issue requires the presence of three interrelated predicates:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . .Second, the minority group must be able to show that it is politically cohesive. . . .Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed, – usually to defeat the minority's preferred candidate.

Thornburg, 478 U.S. at 50-51 (footnotes and citations omitted).

The conditions, as set out by the Court for a successful Section 2 claim, are straightforward; and the United States Courts of Appeals have been consistent in their application of these standards.

I. Unrebutted, Statistically Significant, Temporal Proof of Racially Polarized Voting Cannot Result in a Holding of No Political Cohesion Within the Meaning of Section 2 of the Voting Rights Act Based Solely on Anecdotal Testimony of One Lay Witness, Given This Court's Decision in *Thornburg v. Gingles*, and Given the Decisions of All Courts of Appeals Other Than the Tenth Circuit's Decision Below.

The Supreme Court in *Thornburg* has provided guidance to lower courts about how to evaluate Section 2

claims. With regard to minority political cohesion, the Court focused on the importance of polarized voting. The Court has established that:

> A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim and, *consequently, establishes minority bloc voting within the context of Section 2.*

Thornburg, 478 U.S. at 56. (citation omitted) (emphasis added)[5] In *Thornburg* polarized voting and thus minority political cohesion was established through a statistical analysis of only black versus white candidate elections, using extreme case analysis and bivariate ecological regression analysis. *Thornburg*, 478 U.S. at 52-53. These techniques yielded data concerning the voting patterns of whites and blacks, including estimates of the percentages of members of each race who voted for black candidates. *Thornburg*, 478 U.S. at 53. The range of support from the black community for the black candidate was 71% to 92% in the primary and 87% to 96% in the general election. *Thornburg*, 478 U.S. at 59. This Court held that these levels of support *establish* minority political cohesion. *Thornburg*, 478 U.S. at 61.

Consistent with the Court's guidance the Courts of Appeals have focused on analysis of election results to judge the voting behavior of protected minority populations. As expressed recently by the United States Court of Appeals for the Fifth Circuit, "[minority cohesiveness] is

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[5] The Court of Appeals conveniently omitted the italicized portion of this crucial passage. (App. 12)

not an inquiry to be made prior to and apart from a study of polarized voting . . . *because the central focus is on voting patterns.*" *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) (emphasis added), *cert. denied*, 57 U.S.L.W. 3841 (U.S. June 26, 1989). Uniformly, the courts have adhered to the principle that minority bloc voting establishes the minority community's cohesiveness. *Gomez v. Watsonville*, 863 F.2d 1407, 1425 (9th Cir. 1988) ("the issue of political cohesiveness is to be judged primarily on the basis of voting preferences expressed in actual elections"), *cert. denied*, 57 U.S.L.W. 3620 (U.S. March 20, 1989); *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1555-1557 (11th Cir. 1987) ("Although no one statistical theory is appropriate for all vote dilution cases, the Eleventh Circuit has approved the form of statistical analysis [bivariate regression analysis] used by the plaintiffs in this case."); *Collins v. City of Norfolk, Va.*, 816 F.2d 932, 935-36 (4th Cir. 1987) ("The court should inquire separately into minority and majority voting, to see whether members of the minority usually vote for the same candidate – if so, there is the requisite minority cohesiveness"); *Buckanaga v. Sisseton Independent School District No. 54-4*, 804 F.2d 469, 473 (8th Cir. 1986) (The court applied *Thornburg's* guidance regarding the relationship between racially polarized voting and minority political cohesiveness).

Moreover, the Ninth Circuit specifically rejected as irrelevant differences of political opinion within the Hispanic community when voting patterns demonstrated that Hispanics voted together. *Gomez*, 863 F.2d at 1416. The courts have recognized the relevance of lay witness testimony to the issue of polarization. *See. e.g., Carrollton*

Branch of NAACP v. Stallings, 829 F.2d 1547, 1558 (11th Cir. 1987) (plaintiffs established racially polarized voting through regression analysis *and* the testimony of lay witnesses.) However, anecdotal testimony has never been given greater weight than analysis of election behavior in determining the existence of polarization.

In contrast, the Tenth Circuit here approved the dismissal of objective statistical data analyzing election results. Evidence presented by both petitioners and respondents showed Mexican Americans voted together. Yet, the Court of Appeals approved a holding of no cohesion based on the testimony of a single lay witness who stated that in his opinion the Hispanic community consisted of several politically distinct groups which often supported different candidates.

> There is no indication that the court found plaintiffs' statistical evidence of Hispanic political cohesion to be insignificant because it could be explained by party affiliation. Rather, the court found that Hispanics were not politically cohesive *based on the testimony of Mr. Gomez*, who stated that his involvement in Saguache County politics had led him to the conclusion that Hispanics in the county consisted of several politically distinct groups which often support different candidates.

(App. 11) (Emphasis Added). The testimony of this one lay witness was allowed to overcome uncontested statistical data showing that Hispanic candidates received support from the Hispanic community ranging between 66% and 100% and averaging 87.1%. Allowing the anecdotal testimony of one lay witness to overcome such compelling, objective, uncontested election analysis conflicts

with the holdings of this Supreme Court and of the Fourth, Fifth, Eighth, Ninth and Eleventh Circuit Courts of Appeals.

II. Unrebutted, Statistically Significant, Temporal Proof of Racially Polarized Voting Together With the Defeat of Every Mexican American Candidate to Run in Contested County-wide Elections Cannot Result in a Holding Under Section 2 of the Voting Rights Act That Hispanic Preferred Candidates Were Not Necessarily Defeated by Anglo Bloc Voting – Given This Court's Decision in *Thornburg v. Gingles* and the Decisions of All Courts of Appeals Except the Tenth Circuit Below – Based Solely on the Election Decades Ago of Several Unopposed Hispanic Candidates, and on the Election of Anglo Democrats.

This Court has also provided guidance for determining whether there exists an Anglo bloc vote that usually defeats minority preferred candidates. The Court recognized the primacy of polarized voting and the extent of minority group members' electoral success in a determination of minority vote dilution in a Section 2 claim. *Thornburg*, 478 U.S. at 48-49 n. 15. These factors form the basis for making a determination of whether minority group members are politically cohesive *and* whether the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *Thornburg*, 478 U.S. at 48-51, 56-58. Moreover, the election of a few minority candidates, especially if running unopposed, will not negate the existence of racially polarized voting or the existence of an Anglo bloc vote that usually defeats minority preferred candidates. *Thornburg*, 478 U.S. at 51, 57. Finally, a pattern of racial bloc voting over

time is more probative than the results of a single election. *Thornburg*, 478 U.S. at 57. Thus, where elections are shown to be polarized, the fact that racially polarized voting does not occur in one individual election does not negate the existence of polarized voting or of an Anglo bloc vote that usually defeats minority candidates. *Id.*

The Courts of Appeals have consistently adhered to this Court's guidance, and sustained claims of Anglo bloc voting based on polarized voting and on the continual defeat of minority candidates. *Carrollton Branch*, 829 F.2d at 1559. *See also, Gomez*, 863 F.2d at 1417, where the Ninth Circuit similarly focused on the continual defeat, over time, of Hispanic candidates to show the existence of an Anglo bloc vote sufficiently large to usually defeat the minority vote plus Anglo crossover vote. In *Campos v. City of Baytown*, 840 F.2d at 1245, the Fifth Circuit accepted the proposition that the proper focus in determining whether an Anglo bloc vote usually defeats minority preferred candidates was races involving minority versus Anglo candidates. As the Fifth Circuit recognized in *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503 (5th Cir. 1987), *cert. denied*, 57 U.S.L.W. 3841 (U.S. June 26, 1989), Anglo versus Anglo races became useful only in the absence of elections that offer voters the choice of supporting a viable minority candidate.

The petitioners' expert in this case examined ten county-wide races pitting a Mexican American candidate against an Anglo candidate. The following table shows the levels of bloc voting in those races:

Election	Candidate	r[6]	Signif. Level[7]	Slope[8]	Support for Hispanic Candidates By Non-Hisp. Voters	Support for Hispanic Candidates By Hisp. Voters
*1986 Gen. Election County Comm. D.3	Archuleta	.92	.0004	.67	26%	93%

[6] The correlation coefficient or Pearson "r" measures the relationship between variables being analyzed. In this case the "r" measures the relationship between the proportion of Spanish surnamed voters or registered voters and the proportion of votes received by the Hispanic candidate in each Saguache County voting precinct. An "r" of +1 or -1 shows a perfect correlation between the variables and 0 shows no correlation between the variables. An "r" of .5 or higher would show a strong correlation. (Tr. pp. 274-77)

[7] The "significance level" refers to the probability that the correlation coefficient calculated in a particular election could occur by chance. Here the significance levels ranged from one in a hundred to practically zero. (Tr. p. 285)

[8] The "slope" tells the severity of polarization. A perfect slope would be 1.0. Slopes of .5 and higher would indicate severe polarization when taken together with the respective correlation coefficients. (Tr. pp. 285-86)

Election	Candidate	r	Signif. Level	Slope	Support for Hispanic Candidates By Non-Hisp. Voters	By Hisp. Voters
*1986 Gen. Election County Treasurer	Grant	.92	.0002	.67	18%	85%
*1986 Demo. Primary Univ. Regent	Alvarado	.96	.0000	.72	23%	95%
*1982 Gen. Election County Comm. D.3	Abeyta	.83	.0032	.61	27%	88%
*1982 Gen. Election State House D.60	Marquez	.88	.0007	.54	22%	76%
*1982 Demo. Primary County Comm. D. 3	Abeyta/ Archuleta	.75	.0122	.35	55%	90%
1980 Gen. Election State House D. 60	Gonzalez	.84	.0049	.53	24%	66%

Election	Candidate	r	Signif. Level	Slope	Support for Hispanic Candidates By Non-Hisp. Voters	By Hisp. Voters
1976 Gen. Election State House D. 60	Gonzalez	.98	.0002	.80	15%	95%
1986 Gen. Election County Comm. D. 1	Sanchez	.95	.0011	.68	16%	83%
1976 Demo. Primary State House D. 60	Gonzalez	.91	.0043	.86	22%	100%

*Percent Spanish surnamed of actual voters (other analyses based on percent Spanish surnamed of registered persons.)

(Pl.'s Exh. 14) As the chart indicates, all but one election showed extremely high levels of polarization.

The level of support for the Hispanic candidate from the Anglo voters ranged from 22% to 55% in the primary elections and from 15% to 27% in the general elections. The comparative level in *Thornburg* ranged between 8% and 50% in the primaries and between 28% and 49% in general elections. *Thornburg*, 478 U.S. at 59.

The level of support for the Hispanic candidate from Hispanic voters ranged from 90% to 100% in the primary elections and from 66% to 95% in the general elections. The comparative level in *Thornburg* ranged between 71% and 92% in *most* primary races and between 87% and 96% in the general elections. *Thornburg*, 478 U.S at 59.

Here the correlation coefficients or "r's" ranged from a low of .75 to a high of .98. The coefficients in *Thornburg* ranged from a low of .70 to a high of .98. *Gingles v. Edmisten*, 590 F. Supp. 345, 368 n.30 (E.D.N.C. 1984) aff'd in relevant part, *Thornburg*, 478 U.S. 30 (1986).

Moreover, respondents' expert here concluded that his analysis "indicates that there is a statistically significant correlation between the votes cast for Hispanic candidates and the number of registered Hispanic voters." (Def.'s Exh. A., p.7)[9]

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[9] While the expert concluded that Anglos do vote for minority candidates and that their votes help to elect such candidates, when quizzed about the races *he* chose to review and the elections *he* analyzed, he admitted that in all such races involving a Mexican American candidate, the Mexican American candidate lost. (Tr. pp. 583-85)

The Tenth Circuit recognized that no Hispanic had ever been elected County Commissioner. (App. 3) Moreover, the Tenth Circuit understood that no Hispanic had ever won a county-wide contested election. (App. 5)[10] Yet, despite an overwhelming record of polarized voting, the Tenth Circuit misapplied *Thornburg* and its progeny and held that there did not exist an Anglo bloc sufficiently large to usually defeat minority preferred candidates because: (1) Anglo Democrats had won some elections;[11] and (2) Mexican American candidates had won

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[10] Between 1972 and 1986, 3 Mexican Americans had run and lost for County Commissioner. Between 1972 and 1986, 10 Mexican Americans had run and lost county-wide elections. (Pl.'s Exhs. 8, 10)

[11] The Court of Appeals incorrectly summarized the record on this point. The record does not provide evidence to show that the Mexican American community *sponsored* any of the Anglo candidates for County Commission deemed by the Court below to be candidates of choice of the Mexican American community. In fact the record reveals that the three Anglo Democrats, Mr. Allen, Mr. Willhite and Mr. Grant, who have won election as county commissioners were not candidates that offered voters the "choice of supporting a viable minority candidate." Mr. Allen was not supported by Saguache County Hispanics when the choice was between Mr. Allen and an Hispanic candidate. (Tr. p. 692) Moreover Mr. Allen did not run on Chicano issues. (Tr. p. 78) Mr. Willhite joined in attempts to defund the Head Start program over alleged Chicano political activity. (Tr. pp. 151-166 Pl.'s Exh. #38) Mr. Grant was not sought out to be a representative of the Chicano community and is not associated with the Chicano community (Tr. pp. 99-101, 255). In fact one of the primary campaign strategies employed by Mr. Grant was to disassociate himself from the Mexican American community. (Tr. p. 254)

unopposed elections for a county-wide position.' (App. 12-14) The Tenth Circuit thus expressly affirmed as a matter of law the District Court's discounting of the very evidence that this Court in *Thornburg* identified as probative on this Section 2 issue, and instead held to be more legally probative factors which this Court held to be irrelevant or barely relevant.

This legal analysis employed by the District Court and accepted by the Tenth Circuit wrongly construes Section 2 "to provide minority groups the ability to participate equally in the electoral process and to have the opportunity to elect representatives *only* if those candidates are white." *East Jefferson Coalition v. Jefferson Parish*, 691 F.Supp. 991, 1001 (E.D. La. 1988) (emphasis added by the court) (explaining the irrationality of focusing on white versus white candidate elections when black versus white candidate elections showed polarization); *See also, Thornburg*, 478 U.S. at 82-83 (White, J., concurring); 478 U.S. at 83-105 (O'Connor, J., concurring). Such a focus misapplies the standards under *Thornburg* and is in conflict with the holdings of the United States Courts of Appeals for the Fifth, Ninth and Eleventh Circuits.

CONCLUSION

The decision of the Court of Appeals for the Tenth Circuit conflicts with every other Court of Appeals which has had occasion to review a vote dilution claim under Section 2 of the Voting Rights Act. The decision of the Court of Appeals for the Tenth Circuit also conflicts with the standards established by this Court and by Congress

when it amended the Voting Rights Act in 1982. Congress *did not* intend for a minority community that has been subjected to invidious and continuing racial and ethnic discrimination, that has suffered continual and consistent electoral defeat of its candidates, and that could elect its own candidates if given the opportunity, to be left with only the choice of Anglo candidates as representatives of their interests.

For the foregoing reasons, petitioners respectfully pray that a Writ of Certiorari issue to review the decision of the Court of Appeals for the Tenth Circuit.

Respectfully Submitted,

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JENNIE SANCHEZ, STELLA SANCHEZ, ADELINE SANCHEZ, DORA TRUJILLO, and CHARLES JARAMILLO,

Plaintiffs-Appellants,

vs.

WILLIAM BOND, County Clerk and Recorder of Saguache County, Colorado, CECIL HALL, KEITH EDWARDS, CHUCK GRANT, Board of County Commissioners for Saguache County, JOHN PRICE, County Chairman of the Democratic Party for Saguache County and ROBERT FELMLEE, County Chairman of the Republican Party for Saguache County,

Defendants-Appellees.

No. 87-2860

(Filed May 30, 1989)

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 85-Z-825)

Jose Garza, Mexican American Legal Defense and Education Fund, San Antonio, Texas; and Antonia Hernandez, Norma V. Cantu, Judith A. Sanders-Castro, and Albert H. Kauffman of MALDEF, San Antonio, Texas, with him on the brief, attorneys for plaintiffs-appellants.

S. Morris Lubow, Denver, Colorado; and Robert S. Crites, of Crites and Farish, Monte Vista, Colorado, with him on the brief, attorneys for defendants-appellees.

Before MOORE and ANDERSON, Circuit Judges, and BROWN,* District Judge.

BROWN, District Judge

This is an appeal of a vote dilution case. Plaintiffs-Appellants are voters from Saguache County, Colorado, who contend that the at-large election procedure used to elect county commissioners in Saguache County impermissibly dilutes Hispanic votes in violation of Section 2 of the Voting Rights Act, as amended, 42 U.S.C. §1973. After hearing the evidence, the district court concluded that the plaintiffs had failed to prove a violation of §2 and entered judgment in favor of the defendants. We affirm.

Appellants raise two main arguments on appeal. First, they contend that the district court misinterpreted the Supreme Court's ruling in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), and, as a result, applied erroneous standards of law to the evidence. Second, appellants argue that the trial court's factual findings were clearly erroneous. In order to address these claims, we first review some of the evidence presented in the district court.

Saguache County consists of approximately 3,000 square miles in central Colorado. In 1980, the county had

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*The Honorable Wesley E. Brown, United States District Senior Judge for the District of Kansas, sitting by designation.

a total population of 3,935, of which 41% were Hispanics[1] and 57% were Anglos.[2] Census records indicate that 36% of the voting age population was Hispanic in 1980. Despite the number of Hispanics in the county, no Hispanic has ever been elected to the Saguache County Commission. Colorado state law requires the division of each county in Colorado into three compact districts for the purpose of electing a board of county commissioners. One commissioner from each district is elected by the voters of the whole county. Each commissioner must be a resident of the district he or she is elected to represent.

The plaintiffs presented several witnesses who testified as to the political situation in Saguache County. The witnesses testified that the community was racially polarized and that Hispanics were unable to elect candidates to office in county-wide races. Several of the plaintiffs' witnesses had been defeated in county elections and stated their opinion that their losses were due to bloc voting by Anglo voters.

Plaintiffs also presented the testimony of Dr. Robert Brischetto, an expert on voting patterns and election systems. Dr. Brischetto stated his opinion that Hispanics in Saguache County had less opportunity than Anglos to participate and to elect candidates of their preference. Dr. Brischetto concluded that this condition was due to the

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[1] "Hispanic" was used in the district court to mean persons of Spanish origin. The term was used interchangeably with the terms Mexican American, Chicano, and Spanish surnamed.

[2] "Anglo" refers to non-Hispanic whites.

at-large election procedure used in Saguache County elections. Dr. Brischetto's conclusion was based in large part upon a statistical study of selected political contests. He examined ten races in which Anglo and Hispanic candidates ran against each other. Using the voting results from each precinct, Dr. Brischetto compared the proportion of Hispanic voters in each precinct with the proportion of support received by the Hispanic candidate. He found a high correlation between the two, leading him to conclude that voting in nine of the races was "highly polarized." Dr. Brischetto stated that, in his opinion, whites voted as a bloc to systematically defeat Hispanic candidates. He also concluded that Hispanics were politically cohesive, noting that his study showed that Hispanics generally vote as a bloc for Hispanic candidates.

The defendants' expert gave his opinion that voting in Saguache County was polarized along party lines, suggesting that party affiliation was a better predictor of how a voter would vote than was the race of the voter. The defendants also presented testimony from lay witnesses, who stated that a majority of the Democratic party in Saguache County was made up of Hispanics and that Hispanics controlled the nominating process in the party. The witnesses also testified that an Anglo could not be nominated by the Democratic party without the approval of a group of Hispanics that included several of the plaintiffs. Additionally, the witnesses gave their opinion that Hispanics in Saguache County were not a single cohesive group but consisted of several politically distinct groups. One of the defendants, an Anglo county commissioner, testified that he received substantial Hispanic support in his election to the commission.

Results from county elections dating back to the 1970's were used by both sides in the trial court. Plaintiffs pointed out that no Hispanic had ever won a contested county-wide election and that three Hispanics had run for county commissioner and had been defeated. The defendants showed that a few unopposed Hispanics had won county-wide positions. The defendants also noted that Democratic candidates had been regularly elected to county positions, including the county commission.

I. *Section 2 and the Gingles requirements*

Section 2 of the Voting Rights Act provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b(f) (2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to partipation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered:

> *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

The Supreme Court examined §2 in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). Noting that amended §1973 repudiated the "intent test" of *Mobil* [sic] *v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), the *Gingles* court stated that the question §2 poses is whether, *as a result of* a challenged electoral practice, plaintiffs do not have an equal opportunity to participate in the electoral process and to elect candidates of their choice. The court found that the essence of a §2 claim is that a certain electoral practice interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by minority and white voters to elect their preferred representatives. *Gingles*, 478 U.S. at 48.

In order to address a claim under §2, a court must assess the impact of the contested election practice on minority electoral opportunities by assessing certain objective factors. The Senate Report accompanying the 1982 amendment to §2 lists several factors that may be relevant to a §2 claim:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
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> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

Whether there is a significant lack of responsiveness on the part or elected officials to the particularized needs of the members of the minority group.

Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S.Rep. No. 417, 97th Cong., 2d Sess. 28-29, reprinted in 1982 U.S. Code Cong. & Ad. News 177, 206-07.

Several points should be kept in mind in applying the foregoing set of factors. First, the list is exemplary,

not exclusive. The court may consider any relevant factors in reaching its conclusion. Second. there is no requirement that any particular number of factors be proved or that a majority of them point one way or the other. Third, whether the political processes are "equally open" depends on a searching practical evaluation of the past and present reality and upon a functional view of the political process. *Gingles*, 478 U.S. at 46.

The Supreme Court noted several limitations on actions brought under §2. The court stated that election devices, such as at-large elections, may not be considered *per se* violative of §2. Also, the combination of an electoral mechanism and the lack of proportional representation alone does not establish a violation. And finally, the existence of racial bloc voting may not be assumed; plaintiffs must prove it. *Gingles*, 478 U.S. at 45-46.

In an attempt to give lower courts a framework for analyzing §2 claims, the Supreme Court set forth three "necessary preconditions" which must be present if plaintiffs are to prevail on their vote dilution claim. First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district. Second, the minority group must be able to show that it is politically cohesive. Third, the minority group must show that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. A white bloc vote that normally will defeat the combined strength of minority votes plus white "crossover" votes is said to be legally significant white bloc voting. *Id.* at 50-51. If these conditions are not present, then the challenged electoral practice cannot be considered as the

cause of the minority's inability to elect its preferred candidates. *Id.* at 50.

II. *The District Court's Findings*

The district court addressed the three "preconditions" of *Gingles* in its findings. The court found that Hispanics in Saguache County were sufficiently large and geographically compact to constitute a majority in a single district. The court went on to state, however, that Hispanics were not politically cohesive and that the plaintiffs had failed to demonstrate that whites voted sufficiently as a bloc to usually defeat the minority's preferred candidates.

The court found that Hispanics controlled the Democratic party in Saguache County and that Hispanics had a very strong say as to which candidates could run on the Democratic ticket. Based on this fact and on the testimony of the witnesses, the court found that several Anglo county commissioners had in fact been the preferred candidates of Hispanics. The court also observed that in two recent elections in which Hispanics had run for the county commission, the Hispanic candidate had lost by only 53 votes in one race and by 22 votes in the other. These close races, as well as the election of Anglo candidates preferred by Hispanics, indicated to the court that Hispanics have the ability to elect commissioners under the at-large system currently in use in the county. Considering all of the circumstances, the court concluded that plaintiffs had failed to meet their burden of proving that Hispanics in Saguache County have less opportunity to participate in the political process and to elect representatives of their choice.

III. *The Standards Applied by the District Court*

Appellants first contend that the district court applied an erroneous standard of law in its conclusion that Hispanics were not politically cohesive. Appellants argue that the test for political cohesion under §2 is whether the minority group generally votes as a bloc for the same candidates. Appellant believes that, contrary to the standards set forth in *Gingles*, the district court seized upon party affiliation to "explain away" the plaintiffs' evidence that Hispanics tend to vote for the same candidates.

It is clear from *Gingles* that a showing that a significant number of minority group members usually vote for the same candidates can establish the requisite political cohesiveness under §2. *Gingles*, 478 U.S. at 56. Furthermore, we agree with appellants that a court may not explain away evidence of racial bloc voting by finding that such voting is caused by underlying differences between the minority and white population. The reasons why minority voters may vote alike is unimportant in determining whether in fact the minority group votes as a bloc. Racially polarized voting, which indicates political cohesion, exists when there is a consistent relationship between the race of the voter and the way in which the voter votes or, in other words, where minority voters and white voters vote differently. *Id.* at 53, n.21.

In our view, however, the district court did not employ an erroneous standard in concluding that Saguache County Hispanics were not politically cohesive. As an initial matter, appellants overstate the district court's reliance on party affiliation as a factor in its

decision. The court briefly addressed the study of defendants' expert, Dr. Ellis, who sought to establish that party affiliation was the primary determinant of voter behavior in Saguache County. The court was critical of the methodology used by Dr. Ellis in his study, but tempered its criticism with the comment: "That doesn't mean that I give no weight to the analysis of Dr. Ellis, because I think what he has shown – and probably it's almost clear enough to be seen without any statistics – is that political party plays a very strong role in the results." (Tr. Vol. VII, p. 3). Appellants contend that this innocuous and undoubtably correct observation requires reversal. We disagree. There is no indication that the court found plaintiffs' statistical evidence of Hispanic political cohesion to be insignificant because it could be explained by party affiliation. Rather, the court found that Hispanics were not politically cohesive based on the testimony of Mr. Gomez, who stated that his involvement in Saguache County politics had led him to the conclusion that Hispanics in the county consisted of several politically distinct groups which often support different candidates. We find no support for appellants' contention that the court relied on party affiliation to explain away or rebut evidence of racially polarized voting.

Along this same line, appellants contend that the issue of political cohesiveness must be determined by examining only "objective" factors, such as a correlation and regression analysis of voting data, and not through the testimony of lay witnesses. Clearly, a statistical analysis of voting data is highly relevant to the issue of

political cohesion. *See e.g., Solomon v. Liberty County, Florida*, 865 F.2d 1566, 1574-78 (11th Cir. 1988). We find nothing in *Gingles*, however, to suggest that a trial court is *prohibited* from considering lay testimony in deciding whether a minority group is politically cohesive. *See Gingles*, 478 U.S. at 56 ("A showing that a significant number of minority group members usually vote for the same candidates is *one way* of proving . . . political cohesiveness. . . .") (emphasis added). *See also Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1558 (11th Cir. 1987) (Plaintiffs established racially polarized voting through regression analysis and the testimony of lay witnesses.) The experiences and observations of individuals involved in the political process are clearly relevant to the question of whether the minority group is politically cohesive. This testimony would seem to be required if the court is to identify the presence or absence of distinctive minority group interests. Thus, we cannot conclude that the district court's consideration of lay testimony violated the standards of *Gingles*.

Appellants next argue that the district court considered improper factors in its finding that Anglos do not usually vote as a bloc to defeat minority preferred candidates. Appellants believe that the court erred because it considered the election of unopposed Hispanics to county office as evidence of Anglo support for Hispanics. It must be noted that *Gingles* cautions against attaching too much significance to the success of unopposed minority candidates: "[T]he success of a minority candidate in a particular election does not necessarily prove that the district

did not experience polarized voting in that election; special circumstances, such as the absence of an opponent . . . may explain minority electoral success in a polarized contest." *Id.* at 57. In the instant case, the trial court summarized the significance of the election of unopposed Hispanics as follows:

> There is also, I guess, an assumption in these considerations in the statistics that we should not – the court should not consider the races where an Hispanic is unopposed. But it would seem to me there is an equally important inference that if an Hispanic is unopposed, he is, indeed, supported by Anglos or he wouldn't be unopposed. It seems to me that inference is one which can be made.

(Tr. Vol. VII, p. 4)

The district court did not err in its consideration of unopposed candidates. *Gingles* clearly does not establish a *per se* rule against consideration of such evidence; it does caution against foreclosing claims on that basis alone. In this case, we cannot conclude that the district court gave undue weight to those races in which a Hispanic ran unopposed. The election of unopposed Hispanics was only one of several factors leading to the court's findings on vote dilution.

Appellants also contend that it was improper for the court to consider the election of three Anglo Democrats to the county commission as evidence of Hispanics' ability to elect candidates of their preference. Citing two Fifth Circuit decisions, appellants suggest that it is inappropriate to consider candidates who are not themselves minorities in determining whether racial bloc voting exists and in determining whether the minority group has been able

to elect candidates of their preference. This question is important in the present case because it is clear that the success of certain Anglo candidates played a significant part in the court's finding that vote dilution had not occurred.

The *Gingles* opinion offers little guidance on what significance the race of the candidates is to be given in assessing a §2 claim. In *Gingles*, the district court found that black voters had been denied equal opportunity to elect candidates of their preference. In reaching this finding, the district court considered only elections that pitted black candidates against white candidates. The Supreme Court affirmed but was divided on the importance of the race of the minority group's candidate. Four justices were of the view that "the race of the candidate *per se* is irrelevant to racial bloc voting analysis." *Id.* at 67. Under this view, only the *status* of the candidate as the chosen representative of a racial group is important. *Id.* A total of five justices, however, felt that such a hard and fast rule was contrary to precedent and was not necessary to the disposition of the case. *Id.* at 83, 101. This division on the Supreme Court prompted a difference of opinion among the circuit courts as well. At least one circuit has adopted Justice Brennan's view that the race of the candidate is irrelevant to voting analysis. *See Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1557-58 (11th Cir. 1987). In contrast, two Fifth Circuit cases have interpreted *Gingles* to mean that "the race of the candidate is in general of less significance than the race of the voter – but only within the context of an election that offers voters the choice of supporting a viable minority candidate." *Campos v. City of Baytown, Texas*, 840 F.2d 1240, 1245

(5th Cir. 1988) petition for cert. filed, (citing *Citizens For A Better Gretna v. City of Gretna, La.*, 834 F.2d 496 (5th Cir. 1987), *rehearing denied* 849 F.2d 1471, petition for cert. filed. These cases suggest that the court should exclude from its analysis elections that do not include a candidate who is a minority. *Gretna*, 834 F.2d at 504 ("[I]mplicit in the *Gingles* holding is the notion that black preference is determined from elections which offer the choice of a black candidate.") *But see Overton v. City of Austin*, 1989 U.S.App. Lexis 5927 (5th Cir. May 1, 1989) ("In the absence of further Supreme Court guidance, we do not criticize this methodology, although it is not the only permissible way to approach §2 claims.")

We do not believe that a *per se* rule against examining races that have only white candidates is implicit in *Gingles*. Such a rule would be clearly contrary to the plurality opinion, which views the race of the candidates as irrelevant in voting analysis. Moreover, such a rule is questionable in light of the language of §2, which seeks to give minorities equal opportunity to "elect representatives *of their choice*." 42 U.S.C. §1973(b). Nothing in the statute indicates that the chosen representative of a minority group must be a minority. Additionally, §2 requires that the district court make a determination from the totality of the circumstances, not from a selected set of circumstances. Accordingly, we conclude that there is no rule of law prohibiting the district court from examining those elections having only Anglo candidates. Such elections may be relevant and can be used to discern whether racially polarized voting exists and to measure the success of minority preferred candidates, so long as one of

the Anglo candidates can be considered a preferred candidate of the minority group. As with other types of relevant evidence, the district court has a right to consider these elections and to give them such weight as the circumstances warrant. Based on the facts of this case, we cannot conclude that the district court erred in considering races having only Anglo candidates.

IV. *Factual Findings*

Appellants next challenge the factual findings of the district court. In particular, appellants contest the findings that Hispanics were not politically cohesive, that Anglo Democrats had been chosen by the minority group, and the overall finding that Hispanic votes had not been diluted in violation of § 2.

We begin by noting that the clearly erroneous test of Rule 52(a) is the appropriate standard for appellate review of factual findings, including the trial court's ultimate findings on vote dilution. *Gingles*, 478 U.S. at 79. The application of this standard "preserves the benefit of the trial court's particular familiarity with the indigenous political reality. . . ." *Id.* Furthermore, if the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact it would have weighed the evidence differently. *Anderson v. Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous. *Id.*

Applying the foregoing standard to the record in this case, we cannot say that the district court erred in finding that Hispanics were not politically cohesive. As an initial matter, the district court found the testimony of Mr. Gomez to be straightforward and believable. Mr. Gomez, who was familiar with the political situation in Saguache County, testified as to some of the differences among Hispanics in the county including the differing political objectives of various factions. *See Anderson, supra,* at 575 ("When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings.") He cited instances where Hispanics differed on which candidates to support. For example, he stated that Mr. Abeyta could have won his race for the county commission in 1982, except that members of Abeyta's own family worked against him.

Appellants assume that their statistical evidence conclusively showed political cohesion among Hispanics. Yet, the district court specifically found the plaintiffs' study to be inadequate because it did not consider Anglo candidates who were sponsored by Hispanics. Thus the trial court considered plaintiffs' statistics to be somewhat unreliable. Moreover, we note that of the ten races analyzed by plaintiffs' expert, four involved state representative elections covering a five-county area. The district court may have considered these elections to be of limited value in assessing whether voting for county commission seats was racially polarized. Of the six remaining races analyzed, only three were general elections for the Saguache County Commission. With this limited number of elections underlying the plaintiffs'

claim, together with the evidence suggesting that Hispanics were not politically cohesive, the trial court's finding that plaintiffs failed to meet their burden of proof is not clearly erroneous.

Similarly, the district court was not clearly erroneous in finding that three Anglo Democratic candidates were the chosen representatives of Hispanics. The district court found that Hispanics controlled the Democratic party in Saguache County, a finding that is not seriously challenged on appeal. That finding was supported by the evidence, which showed that Hispanics constituted a majority of the Democratic party and were very active in the political process. There was testimony to the effect that no candidate could secure the Democratic slot in county races without the support of a group of Hispanics that included some of the plaintiffs. There was testimony that Hispanics had chosen and supported Anglo candidates for the county commission. In light of these facts, we cannot conclude that the district court clearly erred in finding that Hispanics had been able to elect several county commissioners, even if the successful candidates were Anglos. Plaintiffs failed to explain how these candidates could obtain the nomination and support of the Democratic party if, as plaintiffs now contend, they were not the choice of Hispanics. Not only did these candidates receive substantial Hispanic support in terms of votes, but the evidence suggests that they were *chosen* by Hispanics in the first place. *Cf. White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973) ("[T]he black community has been effectively excluded from participation in the Democratic primary selection process.") *See also Whitcomb v. Chavis*, 403 U.S. 124, 129, 91 S.Ct. 1858, 29

L.Ed.2d 363 (1971) ("We have discovered nothing in the record or the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen.")

The foregoing factors support the trial court's finding that the electoral system used to elect Saguache County Commissioners does not violate § 2. The high level of Hispanic participation in the political process and the success of several Hispanic-supported candidates weighs heavily against a finding of vote dilution. Also, the plaintiffs' evidence in the district court was found to be lacking in several respects, including the failure of plaintiffs' expert to analyze all of the relevant elections. Although the lack of success of Hispanic candidates is a strong factor tending to show vote dilution, we cannot conclude that the district court clearly erred in finding otherwise. The court carefully considered the totality of the circumstances in this case and concluded that Hispanics have an equal opportunity to participate in the political process and to elect representatives of their choice. This determination is "peculiarly dependent upon the facts of each case." *Gingles*, 478 U.S. at 79. As the Supreme Court stated in *White v. Regester*, 412 U.S. at 769-70: "[W]e are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the . . . [electoral mechanism] in light of past and present reality, political and otherwise."

V. *Sufficiency of the Trial Court's Findings*

Appellants' final contention is that the trial court's findings, which were made from the bench, were not detailed enough to meet the requirements of Rule 52(a). Appellant cites several decisions emphasizing the need for detailed findings in vote dilution cases. *See e.g., Velasquez v. City of Abilene*, 725 F.2d 1017, 1020 (5th Cir. 1984). Although the trial court's findings in this case could have been more detailed, the court made findings on all of the *Gingles* factors and disclosed the factual bases for its findings. This is sufficient to meet the requirements of Rule 52. *See Colorado Flying Academy, Inc. v. United States*, 724 F.2d 871 (10th Cir. 1984), *cert. denied*, 476 U.S. 1182, 106 S.Ct. 2915, 91 L.Ed.2d 544 (1986). *See also McGruder v. Phillips County Election Commission*, 850 F.2d 406, 411 (8th Cir. 1988). Similarly, although written findings are preferable in this type of case, they are not required by Rule 52(a).

The judgment of the district court is AFFIRMED.

APPENDIX B

(p. 1) IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 85-Z-825

JENNIE SANCHEZ, et al.,

Plaintiffs,

vs.

SAGUACHE COUNTY, COLORADO, et al.,

Defendants.

REPORTER'S TRANSCRIPT

(Trial to Court: Bench Ruling)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 4:50 p.m., on the 20th day of November, 1987 in Courtroom C-204, United States Courthouse, Denver, Colorado.

APPEARANCES

MANUEL J. SOLANO, Attorney at Law, 11990 Grant Place, No. 201, Northglenn, Colorado, 80233, and JOSE GARZA and JUDITH A. SANDERS-CASTRO, Attorneys at Law, Mexican American Legal Defense and Educational Fund, 314 East Commerce, Suite 200, San Antonio, Texas, 78205, appearing for the plaintiffs.

S. MORRIS LUBOW, Attorney at Law, 1775 Sherman Street, Suite 1700, Denver, Colorado, 81144, and ROBERT S. CRITES, JR.,

(p. 2) Attorney at Law, P.O. Box 430, Monte Vista, Colorado, 81144, appearing for the defendants.

* * *

PROCEEDINGS

THE COURT: I intend to give a bench opinion. I don't think anything would be gained by my taking this under advisement. About the only thing that would be gained is perhaps a more grammatical decision or one that isn't as disjointed as it may be if I give it from the bench; but I think that the facts in this case are very clear to me and the conclusion that I must reach is clear to me, and it doesn't make sense to keep everybody waiting.

There are many factors that have to be considered. This is not a case where some county or some state legislature is immediately enacting a particular device or scheme to affect the Hispanic voters. We were dealing with a statute that has been in effect for some time; and even though it is true that that statute may be in violation of the Voting Rights Act as – if it is applied to Saguache County, I think I need to say at the onset that what we're talking about very clearly is a statute which says that there has to be at large voting in every county under a certain population; and this statute applies to almost all the counties in Colorado, not just Saguache County.

In considering the testimony on historical (p. 3) discrimination, clearly there has been strong evidence of

historical discrimination against Hispanics which may very well continue to this day. I think the testimony of some of the witnesses, Mrs. Sanchez, Mr. Bobst, Ms. Wittevrongel, and the testimony in the deposition of Dr. Sandoval and his paper all pretty clearly show that there has been a lot of historical discrimination.

I guess the question is whether that historical discrimination hampers or really affects the political effectiveness as – of the Hispanics in Saguache County today, right now, at a time when I have to make a decision whether there is going to be at large voting in this county, as there is in all the other counties, or whether we're going to treat Saguache differently.

I do have to agree that the methodology used by Dr. Brischetto with the percentages, I think, is the correct methodology. And I think that was made clear in the – in this last indication, using the Republican votes or the Republican success. And I think there is problems with using the raw figures, which I suspect strongly that Dr. Ellis recognizes.

That doesn't mean that I give no weight to the analysis of Dr. Ellis, because I think what he has shown – and probably it's almost clear enough to be seen without any statistics – is that political party plays a very strong role in the results.

(p. 4) One problem I have with Dr. Brischetto's analysis is that he makes certain assumptions which may or may not be correct assumptions. The assumption, for example, that the Hispanics are the choice of the Hispanic voters, rather than considering, for example, the election of Mr. Grant, which seems to me by the testimony of

several witnesses, including Mrs. Grant, was the choice of the Hispanic voters, and who won. We didn't hear about Willhite. That was early on. But there has been some testimony that he was the choice of Hispanic voters, as well as – I forget the name of the other one. Allen. But it is clear that in Saguache County, different from some of these other cases, the Hispanics do control the Democratic party; and if they don't have an absolute decision on who runs as a Democrat for county commissioner, they certainly do have a very strong sayso in who is going to be – who is going to run.

There is also, I guess, an assumption in these considerations in the statistics that we should not – the Court should not consider the races where an Hispanic is unopposed. But it would seem to be there is an equally important inference that if an Hispanic is unopposed, he is, indeed, supported by Anglos, or he wouldn't be unopposed. It seems to me that inference is one which can be made. Mr. Edwards testified that he was supported by a number of Hispanics. He won by large majorities. Just in the facts of the votes, Mr. Edwards would (p. 5) have had to have been supported by a large portion of the Hispanic voters.

We have presented also to the Court a situation where in 1986, Mr. Archuleta lost the commissioner race by 22 votes. Had 12 people voted the other way, or had there been a few more of the registered voters that were drummed out by the Democratic party to go to the polls, or had there been a few more absentees, that vote would have gone the other way: Mr. Archuleta would have won. Mr. Freel would have lost. It was 22 votes. And with Mr. Abeyta, too, there were 53 votes that he lost by. Had there

been a very small group that had gone the other way, or a few more absentee votes, or a few more of the registered voters pulled out of their fields or kitchens to go to the poll, he would have won. And that shows that there is a very strong force, a very strong ability of the Hispanics in Saguache County to win these county commissioner races, even though – even though they lost in '86 by 22 votes and lost in '82 by 53 votes and won in '84, because I think the weight of the evidence is that Mr. Grant was the candidate of and supported by Hispanics, even though he may not have been Hispanic himself.

It's also very clear from the evidence, and the Court finds, that Mr. Edwards had to have Hispanic support to win by the majority of votes that he had.

We have testimony from Mr. Gomez which was really an eye-opener, which I suppose was difficult for all concerned, (p. 6) and which goes to one of the critical factors in the – in the elements that the Court must look to; and that is where whether the minority group is politically cohesive. And if Mr. Gomez is to be believed – and he appears to be a credible witness – he is saying that it is not a single cohesive group but two or more groups. Mr. Gomez appears to this court to be sincere that he wants Hispanic candidates to win. He indicated that he supported Mr. Sanchez, even though he ran against him in the primary – yeah, in the primary, and that he has supported and been very responsible for putting into power Hispanics in teaching positions, principals, and so forth, by his influence on the school board.

Something Mr. Gomez said really got to me. It made me wonder if it might not be true. I know that – that the

plaintiffs in this case are very sincere and they want that sure county commissioner race which they could have if this were not at large voting. I mean that's been shown to me, that it could be done. I think they can do it also the way it is, with at large voting. But what he said is that the Hispanics could put into office one or two or maybe even three over the next 10 years, if there is at large voting and if the vote isn't diluted. And he may be right, because these elections are extremely close. He may be right. And it may be that even though we've got very dedicated and sincere plaintiffs in this case and attorneys, I'm sure, that maybe that isn't the best, (p. 7) just from this un – hopefully unbiased viewpoint, up here on the bench.

In looking at both sides, maybe that really isn't the best thing to do from the point of view of what is best in the long run for the Hispanics in Saguache County. If, in fact, the at large scheme with their strong majority in the Democratic party and their ability to come so close in these races, 22 votes, 53 votes, and a win of Mr. Grant – if it stayed at large, they certainly could have one, two, or three county commissioners who were Hispanics, maybe getting out the vote a little more, getting a few more of the registered voters to the poll or a few more absentee votes.

So this court, I think, as all district courts, are very sensitive to any schemes, any plans, any statutes, anything which really dilutes votes, which really affects the ability of citizens to have their full, equal rights in the political process. And I'm very sympathetic to the policy expressed by the voting act, because I, I think, and I'm sure other judges who have decided these very difficult issues, are convinced that members of a protected class

must have equal opportunity to other members to participate in the political process. But this is an unusual case. This is a case where the protected citizens, the Hispanics, are very active in the political process. They control the Democratic party. They came very close to electing county commissioners. There have (p. 8) been elected Hispanics unopposed in the county. I think, if I'm not mistaken, there is an Hispanic county judge, although we haven't heard about the county judges. Mike Trujillo still a county judge?

DEFENDANT EDWARDS: Mike Trujillo.

MR. LUBOW: As far as we know, he is.

THE COURT: This is a case where Hispanics have a strong political party in Center, which is the largest city in Saguache County. They occupy most of the trustee seats, the mayor. We have Hispanics that have been elected to the school board. We have had Hispanics and associates, friends, who have asserted a lot of influence to hopefully improve the situation in Center, to get parts of the city annexed, to improve the school situation.

This Head Start thing, I think is a difficult situation. I have problems with that, because it seems that Head Start obviously is a very excellent program and should be strongly supported; and there is this problem that Mr. Edwards and some others have by feeling that it's too political.

But is this a case where the protected minority does not – has less opportunity to participate in the political process? I can't so find. I can't so find. Not with the

power they've exerted, not as close as they've come to electing commissioners. They exert a lot of power.

So even though the minority group has here (p. 9) demonstrated that it is large and geographically – could be geographically compact, if the at large voting would be discontinued elect a minority person – that is true. That, I can find. I cannot find that the minority group is politically cohesive. I think what we've got is two or more groups. Mr. Gomez, whatever these plaintiffs may feel about that, is a very sincere person, appears to be very strongly committed to electing Hispanics in the county. But also, as he says, he wants to elect – he wants to be free to make his choice on issues and candidates and to elect the person that he's – that's best for the county.

The third element that the white majority votes sufficiently as bloc to enable it to defeat minority preferred candidates has not been demonstrated. The majority certainly votes as a bloc in the area of Republican candidates, but what appears to me from listening to the experts is that we've got a 32 percent unaffiliated or independent group which mostly votes with the Republicans but swings back and forth between the Democrats and the Republicans. And we also have Hispanics among this unaffiliated group.

For all the reasons that I've stated, I have difficulty in finding that the plaintiffs in this case have met their burden of proof. This is not the outrageous case that we see in *Thornburg* or in some of the circuit court cases. This is a case in which Hispanics in Saguache County, yes, have been (p. 10) historically – have had – have faced

historical discrimination but have exerted a great deal of political power, have elected a lot of or have chosen a lot of Hispanics unopposed, have chosen a lot of Hispanics in Center, have had some of their candidates of choice elected as county commissioners, such as Mr. Grant and Mr. Willhite, have lost in such tight races that they could have won them very easily with their power, had they just – there had been just a few other votes the other way.

And that isn't the type of case that is addressed by section 1973. It doesn't meet the burden. And the Court is not going to fix something if it is not broken; and in this case, I am well assured after hearing the evidence that the Hispanic community will continue in their good efforts to do what they feel should be done in Center and in the county, and I have no question in my mind after hearing this case that the Hispanic group will continue to be very politically active and that it is just really a question of time before they do get a county commissioner who may be Spanish surnamed.

The judgment will be entered in this case in favor of the defendant and against the plaintiffs. I want to thank the attorneys, all of them. I want to thank the experts, also. It's been extremely well presented. It's been very interesting, and I've been sitting throughout this trial and wrestling with some of these issues, but I have to decide this as I truly feel it should be decided; and the plaintiffs have just not (p. 11) sustained the burden sufficiently.

I do want to thank the attorneys, and I wish both sides good luck; and if I could say anything that would have any influence, I would strongly urge – of course, you have the right to appeal it, and you may decide to

appeal it; but I would strongly urge, if even if you are going to appeal it, that the parties get their heads together, Mr. Edwards, Mr. Gomez, Mrs. Sanchez and some of the other group, and see if they can make some efforts to cooperate for the benefit of the county, rather than having the polarized positions that they have had in the past. I wish everybody good luck in trying to achieve what's best for Saguache County.

Exhibits will remain with the attorneys pending the appeal; and if the appellate court wants the exhibits, make sure you keep them in a safe place, because the court will call for the exhibits – the appellate court – and they'll have to come from the attorneys.

And Charlotte, if you could just have the attorneys sign that.

By the way, let me say one more thing. There has been no proof at all that even if the at large voting were to be changed that these districts would not – the present districts would not be districts that would result in a fair vote. I think I've not heard anything to tell me – and a couple times I think I asked for it – why the districts as they're presently (p. 12) constituted, the residency districts, would be unfair districts, if, in fact, there were to be a change in the at large provision. The way the evidence has gone, I see no reason to change or to make an exception for this one county, and therefore it's not relevant; but it would appear that the districts are compact, and I don't have any problems with them.

Chris, anything else?

My rulings and my findings of fact and conclusions of law which are stated on the record as though fully set forth – and I do not intend to – I don't think at this time I intend to do a written opinion – apply both to the voting rights case and the claims under the Fourteenth and Fifteenth Amendments. I'm not going to dismiss the Fourteenth and Fifteenth Amendment claims on any grounds owner the factual grounds that I've ruled on the with the voting rights – yeah, with the voting rights case.

The judgment will enter for dismissal of the case. In view of the particular circumstances and the closeness of the questions, I'm going to order that each side should pay his, her, or its own costs.

Anything further that you want on the record?

If anybody can think of any findings that they wish to have on the record for purposes of appeal, would you give me any proposed findings of facts that you're asking for within the next 10 days, and I'll decide whether I want to supplement (p. 13) the findings that I have on the record.

MR. CRITES: Your Honor, excuse me. I believe the statute provides for attorneys fees for the side which prevails.

THE COURT: Does it?

MR. CRITES: I believe that's required; and as to costs, I don't know that it applies to the court costs and the like.

THE COURT: Do you want to give me the citation of the section you're talking to?

MR. CRITES: It's 1983, the Federal statute.

THE COURT: I thought you're talking about 1973.

MR. GARZA: The citation is 19731(e) for the attorneys fees portion of the Voting Rights Act.

THE COURT: 1973 –

MR. GARZA: – 1(e).

THE COURT: Why don't I take a look at that; and if you have a motion for attorneys fees, would you present them within the next 10 days? I frankly didn't really take a close look at that, and I'll be happy to do it.

MR. GARZA: If I may, your Honor, the Court would have to find that the cause was frivolous in order to award attorneys fees.

THE COURT: There is no way I could find it's that.

MR. GARZA: Finding of – for grant of attorneys fees against plaintiffs, that's –

(p. 14) THE COURT: Well, under 1988, if I'm going – if there is any consideration of attorneys fees under 1988, that's how it goes, but I really haven't looked under this section.

MR. GARZA: The standard is the same, your Honor.

THE COURT: Pardon?

MR. GARZA: The standard is the same.

THE COURT: Is it the same as a 1988 standard?

MR. GARZA: Yes, your Honor.

THE COURT: Do you want to just take a quick look at it? File a motion, but don't do it if you're satisfied that it's only if it's frivolous. This is not a frivolous case.

MR. CRITES: No, it's not.

MR. LUBOW: We understand that from the comments of the Court.

THE COURT: Okay, Court is in recess.

(Thereupon, the trial was concluded and the Court recessed at 5:15 p.m.)

(p. 15) REPORTER'S CERTIFICATE

I, Paul A. Zuckerman, Registered Professional Reporter and Official Reporter to this Court, do hereby certify that I was present at and reported in shorthand the proceedings in the foregoing matter; that I thereafter reduced my shorthand notes to typewritten form, comprising the foregoing official transcript; further, that the foregoing official transcript is a full and accurate record of the proceedings described in this matter on the date set forth.

Dated at Denver, Colorado, this 11th day of December, 1987.

Paul A. Zuckerman, CSR, RPR

Supreme Court, U.S.
FILED
SEP 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-353

In The

Supreme Court of the United States

October Term, 1989

JENNIE SANCHEZ, et al.,

Petitioners,

v.

WILLIAM BOND, et al.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

A Colorado statute mandates the at-large election of three county commissioners in most Colorado counties, including Saguache. Local officials have no authority or discretion to change the system. The petitioners did not attack the statute itself, but only its application in and to Saguache County. In a bench trial there was disputed testimony, from experts and lay witnesses, as to whether Hispanics in that county were politically cohesive, whether there was racial bloc voting, and whether the Anglo majority voted sufficiently in a bloc to enable it usually to defeat the preferred candidate of the Hispanic minority. The trial court found in favor of the respondents, on the facts and on the law, and the Tenth Circuit affirmed. The respondents believe that the following questions are appropriate:

1. If the state-mandated system is a proscribed electoral device under the Voting Rights Act of 1965, as amended, was it adopted or maintained by local officials?

2. Based on the quantity and quality of the evidence presented, were the findings of fact by the District Court clearly erroneous?

3. Did the trial court and the Court of Appeals correctly apply the federal law and the Supreme Court interpretations thereof?

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APPLICABILITY OF TITLE 28, U.S.C. § 2403(b).

Title 28, U.S.C. § 2403(b) may be applicable. The United States District Court for the District of Colorado certified to the Attorney General of Colorado the fact that the constitutionality of the state statute had been drawn into question. The Attorney General declined to participate in the trial of this cause.

SUPPLEMENTAL STATEMENT OF THE CASE[1]

A Colorado statute [Appendix A] in effect for many years, requires the at-large election of three county commissioners in most Colorado counties, including Saguache. County commissioners are authorized and required to define the boundaries of the three residency districts, but the voters of the entire county vote for the candidates for county commissioner. Local officials have no right, authority or discretion to alter or disregard the mandate of the statute.

The petitioners disavowed any claim that the current residency districts, if used in a single district election, would produce any different election results; therefore, a redistricting would be necessary to accomplish their goals (324-325). Such redistricting would probably have to disregard established precinct boundaries (349-350).

Dr. Brischetto, petitioners' expert, claimed Hispanics and Anglos vote differently and that it made no difference that the elections were partisan (298). His opinion

[1] Parenthetical references are to page numbers of the Trial Transcript, Appendix B.

was that the present at-large system does not give Mexican Americans an equal opportunity to elect candidates of their choice (359). He analyzed 10 races in which there was an Hispanic candidate (366). He identified the race of each candidate by surname, and *assumed* that only Hispanics would represent the interest of the Hispanic community (366-367, 391, 400) even though he agreed that a candidate must be publicly known or publicly regarded as one associated with the minority for the results to be valid (431-432). He could have done an analysis of the Democratic v. Republican vote with the information he had, but he did not do so (372-373). The witness agreed that if the Hispanic number of votes cast (the turnout rate) remained constant year after year, without regard to the ethnicity of the candidates, that would tend to show that voting is not related to the race of the candidate (395-396).

Dr. Ellis, respondents' expert, was wary of the small samples with which to work in Saguache County (486-487); therefore, he performed a variety of analyses and used those variables which were most statistically significant and that were consistently able to explain the voting patterns in the county (488-489). One of the problems was that four of the nine precincts had only a total of 23 registered Hispanic voters (494). He performed six different analyses on each of 15 political contests (a total of 90 tests) (489). Eight of the political races he examined were for the office of county commissioner, the others were state or local races (491).

Dr. Ellis testified that, in his opinion, any polarized voting is along political party lines, not racial lines (528-529) and, because he also considered contests in

which only Anglos were candidates, he found that Hispanics vote for Anglo Democrats to the same extent that they vote for Hispanic Democrats (529-532, 545). He found no indication that Anglos alter their voting behavior when an Hispanic is a candidate and that Anglos do not withhold or shift their votes to defeat or frustrate Hispanic efforts (534-535). In fact, he found that in all cases analyzed there was a significant white crossover vote in favor of Hispanic candidates (535, 537). The voter turnout rate by Hispanics is the same, whether or not an Hispanic is a candidate (538).

ARGUMENT

I. THE COLORADO STATUTE WHICH MANDATES THE AT-LARGE ELECTION OF COUNTY COMMISSIONERS IS NOT A PROSCRIBED ELECTORAL DEVICE AND WAS NOT ADOPTED OR MAINTAINED BY THE RESPONDENTS.

Title 42 U.S.C. § 1973, the federal statute upon which the petitioners based their claims, prohibits the use of a "standard, practice, or procedure" in any State or political subdivision which results in a denial or abridgment of the right to vote on account of race or color. A violation of that provision is established if it is shown that the political processes in the State or political subdivision are not equally open to a particular class in that its members have less opportunity than others to participate in the political process *and* to elect representatives of their choice.

The Colorado statute [Appendix A] which is claimed to be a prohibited "standard, practice, or procedure" applies to almost all Colorado counties, including Saguache. The county commissioners are required to create three compact districts, of roughly equal population, and these are "residency districts" from which candidates for the commissioner seats are elected. *Board of County Commissioners v. Edwards*, 468 P.2d 857 (Colo. 1979). Notwithstanding the required residency in a particular district, the elections are at-large. All eligible voters in the county may vote for candidates from any residency district.

No local official or group of officials has the right, authority, or discretion to change this state-mandated system. In Colorado, as in most other jurisdictions, local officers act as mere instrumentalities of the state government for the accomplishment of the purposes of the statute, and it is not proper for them to raise or consider the question of the constitutionality of the statute under which they act. *Board of County Commissioners v. Fifty-First General Assembly*, 599 P.2d 887 (Colo. 1979).

The petitioners do not challenge the validity of the state statute itself, admitting that it is facially neutral. They claim, however, that the application of the statute in and to Saguache County violates the federal statute. There is no doubt that the statute is applied in Saguache County in exactly the manner prescribed and required, and in exactly the same manner in which it is applied in the other Colorado counties where it is applicable. In such circumstances it would be inappropriate for the federal courts to hold that this state mandate was

adopted, maintained or enforced by a political subdivision of the state.

The situation is analogous to rulings in cases brought under 42 U.S.C. § 1983. That is, municipal liability attaches only where the decision-maker is responsible for establishing final government policy respecting such activity. Whether an official has final policymaking authority is a question of state law. Municipal liability under § 1983 attaches where -- and only where -- a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292 (1986); *City of Oklahoma City v. Tuttle*, 105 S. Ct. 2427, 471 U.S. 808 (1985); *Lowe v. City of St. Louis*, 843 F.2d 1158 (8th Cir. 1988); *Coogan v. City of Wixom*, 820 F.2d 170 (6th Cir. 1987).

The respondents in this case do not include the State of Colorado or any of its officers who are responsible for the execution and enforcement of state election laws. The federal statute prohibits certain electoral devices in a state or political subdivision, but nothing in the language of the law suggests that a county and its officers, who did not create and do not maintain the challenged state statute, are responsible for a violation of federal law. A fair reading of the federal statute in question here clearly requires that the challenge of a state law is to be brought against the state and its officials, and that officers of the political subdivisions should be required to respond only to challenges to locally adopted or maintained electoral devices.

II. THE FINDINGS OF FACT BY THE DISTRICT COURT WERE NOT CLEARLY ERRONEOUS AND SHOULD NOT BE DISTURBED ON REVIEW.

Rule 52(a), Fed. Rules Civ. Proc., applies to cases under 42 U.S.C. § 1973. *Thornburg v. Gingles*, 106 S. Ct. 2752, 2781, 478 U.S. 30, 79, 92 L.Ed.2d 25 (1986). It was held in *Gutierrez v. Denver Post, Inc.*, 691 F.2d 945, 946 (10th Cir. 1982):

> The trial court's findings are presumptively correct and the appellate court cannot disturb them unless they are clearly erroneous. [citations omitted]. In order to conclude that the trial court's findings are clearly erroneous we must be "left with the definite and firm conviction that a mistake has been committed."

When a matter is tried to the court, the appellate court must view the evidence in the light most favorable to the prevailing party and give it the benefit of all inferences that may reasonably be drawn therefrom. *Amoco Production Co. v. Western Slope Gas Co.*, 754 F.2d 303, 309 (10th Cir. 1985); *Mullan v. Ouickie Aircraft Corporation*, 797 F.2d 845, 850 (10th Cir., 1986); *Anderson v. Bessemer City*, 470 U.S. 564, 573-575, 105 S. Ct. 1504, 84 L. Ed.2d 518 (1985).

The evidence in this case showed the existence of a fact not present in any reported decision involving § 1973, either before or after *Thornburg v. Gingles*, supra. That fact is that one faction of the protected minority in this case [including some or all of the petitioners] had absolute control of the Democratic Party in Saguache County, Colorado. Without the consent and assistance of

Hispanics, no person, Anglo or Hispanic, could be nominated at the Democratic county assembly or could win the Democratic primary election.

The trial court's bench opinion was amply supported by the testimony and exhibits presented and the petitioners should not be heard to complain that there was evidence from which the trial judge could have reached a contrary conclusion (although that is not conceded by the respondents).

The trial court found that what was involved was a state statute which required at-large voting, and that historical discrimination did not hamper or affect the political effectiveness of Hispanics in Saguache County. The trial court specifically mentioned that one problem with the work of petitioners' expert was that he *assumed* that only Hispanics were the choice of Hispanics. The court agreed with the methodology of petitioners' expert, but also gave weight to the analysis of respondents' expert. The court said it was clear without any statistics that political parties played a strong role in the results. The sum of the evidence was sufficient to convince the court that certain named Anglos, over the years, *were* the representatives of the Hispanic population.

The trial court found, *as a fact*, that Hispanics either controlled the Democratic party or had great influence in deciding who could be a candidate. Apparently because of that finding, the trial court found it was relevant to consider the electoral success of unopposed Hispanics. It was also found that certain Anglo candidates were successful only because they had Hispanic support. The closeness of the final results in a number of elections

convinced the court that Hispanics had and exercised substantial political influence in the county.

The trial court had no difficulty in finding that the Hispanics did *not* constitute a single cohesive group, and under the present system they could in fact elect one or more Hispanic commissioners in Saguache County. The petitioners failed to establish to the satisfaction of the trial court that Hispanics had less opportunity than others to participate in the electoral process or that the white majority usually voted as a bloc to defeat minority-preferred candidates. The court did find that the white majority usually voted for the Republican candidates, but that the unaffiliated group consisting of 32 percent of the voters (including a substantial number of Hispanics) was the swing vote which determined the outcome of the elections. [The ability to "swing" the outcome of an election is a significant form of political access. *Seamon v. Upham*, 536 F. Supp. 931 at 948 (E.D. Tex. 1982).] Whether the system used had the effect of diluting the minority vote is a question of fact, not law. *Thornburg*, 106 S. Ct. 2781, citing *Rogers v. Lodge*, 458 U.S. 613, 102 S. Ct. 3272 at 3278-3281 (1982) and *City of Rome v. United States*, 446 U.S. 156 at 183, 100 S. Ct. 1548 at 1565 (1980). In *Thornburg*, the Supreme Court adhered to its previous rulings that the ultimate finding of vote dilution is a question of fact subject to the clearly erroneous standard of Rule 52(a). Quoting from its decision in *White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332 (1973), the court said:

> We are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the . . . multimember district in light

> of past and present reality, political and otherwise [citations omitted].

Each and every finding of the trial court was justified and supported by substantial evidence in the record and the judgment, based on those findings, should not be disturbed on review.

III. THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY APPLIED THE FEDERAL LAW AND THE SUPREME COURT INTERPRETATIONS THEREOF.

Title 42 U.S.C. § 1973, as interpreted by the Supreme Court in *Thornburg v. Gingles*, 106 S. Ct. 2752 (1986), contains the criteria by which the case for the plaintiffs was to be won or lost. There are three limitations on the ways in which a violation may be proved. *First*, electoral devices, such as at-large elections, are not per se violations; plaintiffs must prove that, under the totality of the circumstances, the challenged device results in unequal access to the electoral process. *Second*, the combination of the challenged electoral device and the lack of proportional representation does not establish a violation. *Third*, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it. *Thornburg*, 106 S. Ct. at 2764. The trial court clearly found that Hispanics have equal access to the electoral process; that, because Anglos regularly were the representatives of Hispanic voters, there was not a lack of proportional representation; and that the petitioners had failed to establish the existence of racial (as opposed to political) bloc voting.

As to the three tests to determine whether there exists racial bloc voting (*Thornburg*, 106 S. Ct. at 2766-67),

the trial court did find that the Hispanics in Saguache County were in a group that was large and "could be geographically compact". However, the court found no proof that at-large voting using the present residency districts would result in an unfair vote. The trial court also concluded that the petitioners had failed to prove that the Hispanics, as a group, are politically cohesive or that the Anglos vote as a bloc to defeat the minority's preferred candidate.

Contrary to the assertions of the petitioners, the trial court did not accept any explanation of racially polarized voting. Instead, the court found that the evidence did not prove the existence of racially polarized voting. In Saguache County, party affiliation is, in and of itself, a major factor in the election results and does not result in, or result from, racial polarization. The evidence simply did not convince the trial court that racial bloc voting in fact existed.

The trial court was not obligated to accept the view or conclusions of one expert over those of another. Indeed the court was at liberty to disregard any statistical analysis. "[T]here is no simple doctrinal test for existence of legally significant bloc voting." *Thornburg*, 106 S. Ct. at 2770.

In *Davis v. Bandemer*, 106 S. Ct. 2797 at 2801-2802, 478 U.S. 109, 92 L. Ed.2d 85 (1986), decided on the same day as *Thornburg*, the court recognized the right of the trial court to disregard conflicting statistical evidence if it did not "wish to choose which statistician is more credible or less credible." Although that case dealt with a statewide reapportionment plan, the concept that the mere lack of

proportional representation will not be sufficient to prove unconstitutional discrimination applies to individual districts. 106 S. Ct. at 2810. There the court noted that it could not presume that those who are elected will disregard the disproportionately underrepresented group, and that there is no unconstitutional discrimination unless the system is such that it will consistently degrade a voter's influence on the political process as a whole. In this case, the trial court found on substantial supporting evidence that the minority group exerted a strong degree of influence on the electoral process. Indeed, because Hispanics *controlled* a major political party, no other conclusion was possible.

The Voting Rights Act neither entitles a minority group to be included in a single voting district nor requires the electoral segregation of any segment of the majority population whose views conflict sharply with those of the minority. *Latino Political Action Committee v. City of Boston*, 609 F. Supp. 739, 747 (D.C. Mass. 1985). Even where an at-large system interacts with a racially or ethnically polarized electorate to the disadvantage of the minority, the result is not necessarily a denial of political access. *Jones v. City of Lubbock*, 727 F.2d 364, 384 (5th Cir. 1984), citing *Whitcomb v. Chavis*, 403 U.S. 124 at 156-60, 91 S. Ct. 1858 at 1875-77 (1971).

The burden of proof was always upon the petitioners to show that the system complained of constituted a violation of the federal law and, in this case, they have failed to do so. The adverse judgment suffered by the petitioners was not the result of the trial court's failure to apply the proper standards; it resulted from the failure of

the evidence to convince the trier of fact that the petitioners should prevail.

CONCLUSION

The respondents did not adopt and they do not maintain the requirement that county commissioners be elected from the county at-large. Local officials have no authority or discretion to disregard the state-mandated requirements for election; therefore, any action concerning the validity of such requirements should be brought against the State or the appropriate state officials.

In this case there was substantial evidence in the record to justify and support the findings of fact by the trial court. The trial court was free to accept the testimony and conclusions of one expert over those of another, or to reject the conclusions of both, and the credibility of each witness was a matter for the trial court to determine. The trial court determined that the at-large system did not adversely affect the opportunity of the petitioners to fully participate in the electoral process and to elect representatives of their choice. The long-term control of a major political party by the protected minority negated most claims of the petitioners and was further justification for the trial court's finding that the minority had, in fact, elected representatives of their choice.

The trial court neither misunderstood nor misapplied the legal tests for determining any violation of the federal statute. The facts, as found and determined by the trial court, lead to the inescapable conclusion that the petitioners failed to prove their case. The judgments of the

trial court and the Court of Appeals were eminently correct, and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

COLORADO REVISED STATUTES

30-10-306. Commissioners' districts – vacancies. (1) Each county shall be divided into three compact districts by the board of county commissioners. Each district shall be as nearly equal in population as possible, shall be numbered consecutively, and shall not be subject to alteration more often than once every two years. One commissioner shall be elected from each of such districts by the voters of the whole county. If any commissioner, during his term of office, moves from the district in which he resided when elected, his office shall thereupon become vacant. All proceedings by the board of county commissioners in formation of such districts not inconsistent with this section are confirmed and validated.

(2) Each county having a population of seventy thousand or more which has chosen to increase the members of the board of county commissioners from three to five shall be divided into three or five districts by the board of county commissioners according to the method of election described in section 30-10-306.5 (5) or (6). The districts shall be as nearly equal in population as possible, shall be numbered consecutively, and shall not be subject to alteration more often than once every two years. Commissioners shall be elected at large or from districts according to the method of election described in section 30-10-306.5 (5) or (6). If any commissioner required to be resident in a district moves during his term of office from the district in which he resided when elected, his office shall thereupon become vacant. All proceedings by the board of county commissioners in

formation of such districts not inconsistent with this section are confirmed and validated.

(3) When a board of county commissioners determines to change the boundaries of commissioner districts or when new districts are created, such changes or additions shall be made only in odd-numbered years and if made shall be completed by September 30 of such year, except in cases of changes resulting from changes in county boundaries.

(4) Notwithstanding subsections (1) to (3) of this section, after each federal census of the United States, each district shall be established, revised, or altered to assure that such districts shall be as nearly equal in population as possible based on such census in the following odd-numbered year and shall be completed by September 30 of such year.

APPENDIX B

PARTIAL TRIAL TRANSCRIPT

* * * (p. 297)

similar information within this exhibit; that is, the page listing the data that was used and then the graph with the figures at the bottom?

A. Yes, that's correct.

Q. Now, what conclusion can you reach from the analysis that you've conducted?

A. Well, I think it's – what I found is very clear and consistent pattern of racially polarized voting between Anglo and Hispanic voters in Saguache County. And I found this over a period of 1976 to 1986, and the polarization was found in all cases except one; and in that one case, where we had two Hispanic candidates running against one Anglo candidate, I could not say that we found highly polarized voting.

Q. In that one race?

A. That's right.

Q. Now, the Judge asked you some questions about party affiliation and the impact on your analysis. Does the fact that elections were partisan affect your conclusion?

A. No. I mean I analyzed Democratic primaries as well as general elections; and I found the same patterns in both..

THE COURT: Well, except for one. That was the primary.

THE WITNESS: That's right. Except for one of the three primaries that I analyzed. I'm saying my general conclusion, though, is that in the primaries, in – I could only (p. 298)
find three primaries where there were actual head-to-head contests between Anglos and Hispanics; and so I made a – I analyzed those; and in one of the three, we had – did not find severely polarized voting. It certainly was – there was a difference in the support for the Hispanic candidate by Hispanic voters and non Hispanic voters, a difference, if you combine the Hispanic candidates – you found that they combined about half of the Anglo vote; but the difference – the fact that they did receive that much of the Anglo vote, I would not call that race, then, severely polarized. And so in one of the cases, it was not severely polarized.

BY MR. GARZA:

Q. Dr. Brischetto, would it be fair to conclude that Mexican Americans and Anglos are voting different, from this analysis?

A. Well, very clearly.

Q. And does that – is that impacted in any way by the fact that elections are partisan?

A. No. I mean the conclusion is the same whether you look at partisan or nonpartisan races.

Q. Does this analysis – or what does this analysis tell us about minority voter political cohesion?

A. Well, it tells us that certainly Anglos are voting as a bloc and Hispanics are voting as a bloc, and they're

voting differently. And so there is political cohesiveness in both the communities.

(p. 299)

Q. All right. Now, if you would look, please, at Plantiff's Exhibit No. 8 –

THE COURT: Maybe this would be a good time to take a break before we start with 8.

MR. GARZA: Sure.

THE COURT: We're about ready for an afternoon break. Let's take a 15-minute recess.

(The Court was in recess from 3:40 till 4:10 p.m., and when reconvened, the following proceedings were had and entered of record:)

THE COURT: You understand you're still under oath in this case?

THE WITNESS: I do.

BY MR. GARZA:

Q. Dr. Brischetto, instead of Plantiff's Exhibit 8, let me refer you first to Plantiff's Exhibit No. 15 and ask if you would please describe that for the Court.

A. Plantiff's Exhibit 15 is a socioeconomic profile of Saguache County.

Q. What does that mean?

A. That takes various indicators of social stratification in the community, social and economic indicators, and analyzes them with regard to both the Hispanic community and non Hispanic community, the extent to which

the two groups are stratified and – stratified in regard to these various factors,

* * * (p. 323)

by the defendants or the plaintiffs. It's simply premature.

MR. GARZA: Your Honor, Plaintiffs do not attempt to submit Plantiff's Exhibit No. 6 and 7, which are the single member district plan, as a suggested remedy; but rather we submit Plantiff's Exhibits 6 and 7 in order to demonstrate that it is possible to draw a single member district plan in which Mexican Americans, or the minority population of Saguache County, is a majority of a particular district, as is our burden under *Gingles*.

THE COURT: Now, let me just understand, because it was not at all my understanding that you were asking for redistricting in this lawsuit. You were asking for the Court to rule on the at-large provision.

MR. GARZA: Your Honor, as a remedy, we would be asking the Court adopt a single member district election plan, which is the traditional remedy when at-large election plans are found to dilute minority voting strength.

THE COURT: But it goes to what the districts in reality are today, not with redrawing districts. If you're asking for redrawing of districts, then you need a three-judge court. We talked about that before.

MR. GARZA: No, your Honor. We're asking that the at-large election system be outlawed in Saguache County under section 2 of the Voting Rights Act.

THE COURT: That's what you were asking for.

(p. 324)

MR. GARZA: And the courts have consistently said that a remedy for such a violation is the implementation of a single member district plan. And Mr. Lubow is right; That should be considered at a remedy hearing post determination of liability. Plantiff's Exhibit No. 6 is not being submitted to the Court with the intent of offering a remedy at this stage. Rather, we are offering it to meet our burden under *Gingles*, which says we must demonstrate that it is possible to draw a single member district in which the minority community is a majority of that district.

THE COURT: You do not intend to show in this lawsuit that one of the three existing districts, if the at-large provision were eliminated in Saguache County, would result in different results?

MR. GARZA: I don't think that it does, your Honor; and we do not intend to show that, no.

THE COURT: Okay. I'm afraid I'm a little bit at a loss in trying to understand what you're asking for, because I did not understand that you were asking for a redistricting of Saguache County. Are you?

MR. GARZA: Yes, Judge.

THE COURT: Not in this lawsuit, though.

MR. GARZA: Yes, Judge, in this lawsuit. It – in our complaint, in our request for relief, we specifically asked that a single member district plan which is fairly drawn and (p. 325)
complies with Federal law be adopted by this court as a

remedy, as remedy to the violation of section 2, which the at-large election system is.

THE COURT: Could you refer me to your complaint where you ask for that, please.

MR. GARZA: Certainly, your Honor. At page 5 of plaintiffs' amended complaint under prayer for releif at paragraph D: "order into effect a single member district plan for the election of members of the Saguache County Commission which provides Plaintiffs with a remedy for violation of their rights as described above"; and paragraph E, "to redistrict the present county commissioner seats."

THE COURT: It wasn't in your original complaint.

MR. GARZA: I believe it was, your Honor.

THE COURT: It was?

MR. GARZA: At page 4 of Plaintiffs' original complaint under prayer for relief paragraph C: "order into effect a plan for the election of members of Saguache County Commission which provides Plaintiffs and those similarly situated with a remedy for the violation of their rights as described above"; and paragraph D, "to redistrict the present county commissioner seats."

THE COURT: All right. I thought when I reviewed the complaints and reviewed the pretrial order – I thought we were pretty well talking about the statute, but you are asking for

* * * (p. 349)

THE COURT: 1973 2(b)? Do you have the statute with you, Chris?

MR. LUBOW: I have it.

THE COURT: Well, I'm sure he can get it.

I think we have a more – I have a question that I'd like to hear answered before I admit this exhibit; and that is are the lines on 7 drawn along precinct lines.

THE WITNESS: No, your Honor, they are not. And may I explain why?

THE COURT: No, let me just ask you a question.

THE WITNESS: All right.

THE COURT: Dr. Brischetto, if the plaintiffs in this case are asking that the voting not be at large; that it be by district, then how on earth are you going to have a district vote unless the lines are along precinct lines.

THE WITNESS: Your Honor, it's not necessary to maintain precinct boundaries in drawing the best plan. In fact, it may that can you – one would have to reconstitute the voting precincts in order to give a fair chance of minorities electing a candidate of their choice or a district that would allow them an equal chance of electing a candidate of their choice.

THE COURT: So your plan contemplates redrawing precinct lines, also.

THE WITNESS: It may require that, your Honor, yes.

THE COURT: What do you mean "may"? You can't have (p. 350)
people coming into a precinct –

THE WITNESS: No, it would.

THE COURT: – for two different districts in the precinct.

THE WITNESS: It would require that under our plan.

THE COURT: Did you try to look at the situation based on the existing precinct lines?

THE WITNESS: Well, no, I did not – I was not provided those data, and I did not have population data by precinct lines.

THE COURT: I know you don't have population, but you do have apparently the – didn't we have information by precinct in one of these exhibits? I'm trying to remember which one.

THE WITNESS: I did have information on registered voters by precinct. And I had counts of Spanish surnames among those registered voters that I did for the year 1984. However, the way I understand that these plans are to be drawn is the basis – I've always been, in following the instructions of the courts and so forth – I've been asked to draw these according to 1980 population data, rather than on the basis of registration data. And so that's what what I used. I used 1980 census data; and with 1980 census data, I was able to come up with a – with – MALDEF was able to, in working on these data, come up with a plan that would provide the – with the use of enumeration district lines a – a plan which I would consider both compact and contiguous and which would have a large concentration of

* * * (p. 359)

THE COURT: Okay. Go ahead.

MR. GARZA: Thank you, your Honor.

BY MR. GARZA:

Q. Dr. Brischetto, considering all the analysis that you've done and all the records that you've reviewed, all the articles that you've reviewed, all the testimony that you've heard, do you have an opinion as to whether the current at-large election system for Saguache County – or what is your opinon as to the impact of the currently at-large election system for Saguache County commissioners on minority voter participation?

A. I think the present at-large system in Saguache County does not give Mexican Americans an equal opportunity at the polling place in electing candidates of their choice and denies them equal opportunity.

Q. As you have defined voter dilution, does the current election system dilute minority voting strength in Saguache County?

A. I think it very clearly does.

MR. GARZA: Pass the witness, your Honor.

THE COURT: Before we hear cross-examination, when you say candidates of their choice, are you talking about only county-wide candidates, or are you talking about local candidates?

THE WITNESS: I'm talking about in the county elections.

* * * (p. 366)

Q. You said at the beginning of your testimony you had a correlation or you had done correlation regression analysis to determine the proportion of votes for Hispanics related to the voters who are Hispanic. Did I get that correct?

A. That's correct, related to the proportion of voters in a precinct that are Hispanic, yes.

Q. And is that why in your analysis, you analyzed 10 races in which there was at least one Hispanic candidate?

A. That's right.

Q. But you didn't analyze any races in which there was no Hispanic candidate?

A. That's correct, in the exhibit that I presented. That's correct.

Q. How did you determine that none of the races in which there were only Anglos running involved a candidate desired by some or many or all of the Hispanics in the county?

A. Well, actually, since I didn't have prior information as to which of the Anglo candidates might be the choice or – of the Hispanic community and represent their interests, I chose to identify candidates by surname; and the assumption that I was making was – I think it's a reasonable one – that those candidates that are Hispanic would be most likely to be seen by the Hispanic community as representing their interests. Now, that's not always true; and indeed, there may be some Anglo candidates that would represent their interests, even –

(p. 367)

Q. For your work in this case, you assume that nobody with an Anglo name was representing the interests of the Hispanics?

A. I had no information that would lead me to conclude that.

Q. Was my statement right: that you made that assumption for your work in this case?

A. Would you repeat it, please.

Q. For your work in this case, is it true that you assumed that no candidate with an Anglo name represented Hispanic interests?

A. That is why – without any information as to whether or not a candidate, an Anglo candidate had – did represent Hispanic interests, I did make that assumption, yes.

Q. All right. You also knew or assumed that the great majority of Hispanics in that county were affiliated with the Democratic party?

A. No, I didn't make that assumption.

Q. You didn't have information to that effect?

A. Oh, I did have some information about the party identification of Hispanic registered voters.

Q. And didn't that show that the majority of Hispanics were registered, if they were registered – were registered as Democrats?

A. Yes, it showed that about three-fourths of Hispanics that were registered in 1984 in Saguache County were registered as Democrats.

* * * (p. 371)

particular precinct, nowing how many are registered Anglos and knowing how many were registered Hispanics, how do you know how many of those registered Anglos voted for the Anglo candidate and how many voted for the Hispanic candidate?

A. If you'd like me to go through the procedure, I'd be glad to describe how I did my – how I did my estimates.

Q. You can't tell me in a few words the general method of how you know?

A. Yes. What we do is we look at the pattern in the relationship between the ethnic composition of the precinct – that is, the percent Hispanic of voters in the precinct – and the percent or – of votes received by the Hispanic candidate. After plotting each precinct according to that – those two variables, we then look for a pattern in the data; and if there is a straight line pattern, it would show up in the regression analysis as a high correlation.

Q. Let me stop you for a moment. I don't know whether you made a statement in error or not. You talked about the Hispanic candidate and the Hispanic votes that he got. Did you mean Hispanic votes or total votes?

A. No, I meant the total votes received by the Hispanic candidate. Thank you. But what we're doing ultimately after looking is predicting the votes – percentage of votes received by the Hispanic candidates from knowing the ethnic composition of the precinct. We can then through drawing the regression (p. 372)

line, which is a description of the average pattern of the

precincts – we can look at what that vote is at – where the percent Hispanic for a precinct is zero, and our prediction would then give us the Anglo vote. That would be Anglo equals 100 percent. That would give us the Anglo vote, the estimate of the Anglo vote for the Hispanic candidate. And at that point at which the ethnic composition, where the regression line crosses at Hispanic percent equals 100, that would give us the Hispanic – our prediction of the Hispanic vote for the Hispanic candidate.

And those estimates are derived, then, from our regression analysis. And those estimates gave me the ones that I presented in the summary table there of the Anglo and the Hispanic votes for the Hispanic candidates.

Q. Well, isn't it also true that if a particular precinct, the number of registered Republicans is zero, then the number of votes that a candidate got from Democrats would be a hundred percent; and the more Republicans you then get in, into that precinct, then the candidates' votes will drop when you consider how many Democratic votes he got? Isn't that right? Isn't that the same thing, only I've substituted Democrat and Republican instead of your statements of Hispanic and Anglo?

A. If you're asking me wouldn't I be able to do the same analysis on – in predicting the Democratic and Republican vote, yes, that could be done, also.

(p. 373)

Q. Did you do that in this case?

A. I – actually, I did not in these exhibits. I was looking over the – I'm trying to remember what analysis I did on

Mr. Ellis' – Dr. Ellis' report; and as I recall, I was also looking at the correlations that he ran on Democrat – percent Democrat.

Q. I'm sorry. My question was in the 10 races you analyzed as far as Hispanic and Anglo, did you also in those same 10 races analyze Democrat vs. Republican?

A. Those 10? I believe I did for some of them.

Q. But they're not included in the documents that are –

A. No, I was interested in the polarization question – not polarization along Democrat or Republican lines.

Q. You said that in each of the cases you analyzed, you weighted the votes. The votes, if I – let me see how close I am to your statement. The votes were weighted to give equal weight to each voter by how many votes he represents. Is that about right?

A. No. The precincts were weighted according to the number of votes that that precinct represents.

Q. Give me an example, if you will, please?

A. For example, in 1986 in the general election, let's take the election in the Democratic primary. In precinct No. 2, the total votes cast was actually six votes – seven votes, in one precinct. That's in Precinct 2. In Precinct 1, the total votes cast was 161 votes. Obviously, one of those has got

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* * * (p. 391)

correct that in that case, you didn't know and you assumed that the Anglo was not the candidate of the Hispanics?

A. I'm sorry. Would you go back to the question again and repeat it?

Q. The basic question: When you considered those win rates, how did you know that the Anglo who was running was not the candidate of the majority of the Hispanics?

A. In the win rates that are presented in exhibits –

Q. I believe 10 through 13.

A. Yes, 10 through 13. I did not know who the preferred candidate was. I simply looked at how Hispanic candidates faired compared to non Hispanic candidates; and I did make an assumption there that Hispanic voters would probably prefer Hispanic candidates; that is, that they would consider Hispanic candidates as representing their interests. It may not have always been a true assumption, but it was the only information that I had to be able to compare how Hispanic voters were – whether they were frustrated in their attempts to elect candidates of their choice.

Q. Do you remember a Democratic party primary race between Ulie Sanchez and Mr. John – Juan Gomez?

A. Yes, I remember that mentioned in the testimony.

Q. You didn't analyze that case?

A. Let's see. What year was that?

Q. 1976, I believe.

* * * (p. 395)

A. No, if it was truly polarized, generally we find in

races that are truly polarized along ethnic lines that there is a higher turnout.

Q. You may have said the same thing I did in another way. I asked you to assume that the voting was approximately the same year after year among Hispanics. There are approximately how many registered Hispanics in Saguache County? Is it 900-some?

A. The number of registered Hispanics in 1984 was 400 – let's see – 2,482 voters that year. 36.5 percent of them were Hispanic. 906 were Hispanic.

Q. And that number doesn't change too much from election to election, does it: a few points, a few registrations up or down?

A. The number registered? I don't think it changed much over the years. I can't –

Q. Now –

A. – recall exactly.

Q. Back to my original question: I want to use as an example. Suppose of those 906 registered Hispanics, 850 of them vote every two years in the general election, '82, '84, '86, whether there is a Hispanic candidate, Anglo candidate, or whatever. What would that indicate if the number of registered Hispanics that vote stays constant?

A. It would indicate that the turnout rate was about the same for the various elections.

(p. 396)

Q. And that had – turnout rate had nothing to do with the race of any candidate. Isn't that correct?

A. It would tend to be then not related to the race of the candidate.

Q. And doesn't that provide some indication that the voting is not racially polarized?

A. Well, I would look for other data to indicate whether a race was racially polarized.

Q. We're all going to look for other data; but with that data, doesn't that piece of information weigh on the scale on the side of no – there is no racially polarized voting?

A. I would say that if I had no other evidence and I were given information about turnout rates and there was no change in turnout rates, some of the races involve Hispanic candidates and some of the years they didn't run, then I would say either – I probably wouldn't have enough evidence to conclude that there was or was not racially polarized voting. I'd want additional evidence. But I would – I would wonder whether or not the – during when the Hispanics ran – no, I actually – I cannot say that I would be able to conclude anything about polarized voting just from looking at that.

Q. I don't think anyone else would conclude anything from just looking at that. I'm talking about where that factor belongs. Does it belong on the yes side, there is polarized voting, or on the no side, there is not polarized voting?

* * * (p. 400)

from.

A. Okay. My general conclusion was to defeat candidates that are of the choice of the Hispanic community.

Q. But you were assuming that only those with Spanish last names were the choice of the Hispanic community. Isn't that what your assumptions were?

A. For purposes of this analysis in Plantiff's Exhibit No. 14, that's correct.

Q. Well, then, what about the candidates with an Anglo last name who were supported largely by Hispanics? Isn't that another way of saying that was the candidate of the Hispanics?

A. Yes, they would be; and if I had had that information prior to doing this analysis, I think I would have run it and indeed I have run that particular – in that case, on some of those races for McClure, and found that the same pattern came up about being their choice. They voted for him, being their candidate.

Q. How about the race for Charles Grant?

A. No, I did not treat that as the – again, Grant was treated as – for purposes of this analysis, you're talking about county treasurer's race?

Q. It's the wrong Grant. Charles Grant who ran for county commissioner.

A. No, I did not have any information that led me to believe that he was a candidate of their choice.

(p. 401)

Q. Okay. If you had known that he was the husband of the other Grant who ran for county treasurer, would that have made a difference?

A. Well, I'd have to have a little more information. The question is do Hispanics in the community, not who he's

married to – but whether Hispanics in the community see Mr. Grant as their candidate, a candidate of their choice.

Q. In every case where there was an Hispanic, you just assumed that that was a person running on behalf of the majority of the other Hispanics. Is that right?

A. For purposes of my analysis in Plantiff's Exhibit 14, I had to make a choice as to which races to run, to analyze, that might be a test of my hypothesis that there is racially polarized voting. And I, lacking any other information, I was – I used surname because that's the most commonly perceived outward identifier of a person's – what a person represents in terms of interests.

Q. Okay.

A. And I used that as my indicator to test my hypothesis, and I went through and analyzed those races where Hispanics were running against non Hispanics with the assumption that the Hispanics might be representing the interests of the Hispanic community.

Q. Did you analyze the race where Mr. Barela was a candidate for county sheriff?

* * * (p. 431)

reported by the Supreme Court in which they said what the trial court did was fine. Is that right?

A. I am.

Q. But you're not familiar with what the trial court actually did other than with respect to accepting the study of your friend, Dr. Groffman?

A. No, that's not correct. I am familiar with what Dr. Groffman did in his analysis, because I have discussed that analysis with him.

Q. But I understood from your testimony you weren't aware of the fact that there was another type of analysis presented by Dr. Theodore Erington which came to the same conclusions as Dr. Groffman. You didn't know that?

A. No, I'm not familiar with that analysis.

Q. You said that the other report you referred to even Dr. Groffman indicated that the candidate must be publicly known as a minority candidate or one who is for the minority party, whoever it may be in that case, "publicly known" being the major words. Is that right: publicly regarded?

A. There must be some sign for the public to identify whether that candidate is one that they can identify with or not, minority group can identify with.

Q. And once again, you didn't do that except by talking to the plaintiffs and by going by an Anglo name as opposed to an Hispanic name?

(p. 432)

A. That's correct. The only way in which when I began my analysis that I knew what might be the particular – whether a particular candidate had the backing of the racial minority was by looking at the ethnicity of the candidate.

MR. LUBOW: I have no further questions.

THE COURT: Any other questions on redirect?

MR. GARZA: No other questions, your Honor; but I would like to offer the Court the citation for the law journal article that Dr. Brischetto referred to. It's the Hastings Law Journal at Volume 34, and the particular item that he was referring to is at page 59 and 60.

THE COURT: All right. What's the date on that? Do you have a date?

MR. GARZA: September, 1982. And the title of the article is "From *Reynolds v. Simms* to *City of Mobile*, Have the White Suburbs Commandeered the Fifteenth Amendment?"

THE COURT: From –

MR. GARZA: "From *Reynolds v. Simms* to *City of Mobile v. Bolden* . . . "

THE COURT: If they have that upstairs in our library, I'll have my law clerk take a look at it.

MR. GARZA: Thank you, your Honor.

No other questions for this witness.

THE COURT: Did you want to excuse him, or did you want him to remain available?

* * * (p. 485)

pages of how the data was utilized, how it was analyzed, and what conclusions were reached.

Q. Would you describe where you got the data that you used in Exhibit A?

A. When I was approached some two years ago to do the analysis, Saguache County at that time provided relevant data, broken down by race and by party. We also

had the voting abstracts from 1970 to 1984, but data on voters registration by Democrat, Republican, unaffiliated, and data broken down by race, white, Hispanic, was only available at that time for the year 1984.

MR. CRITES: And would the clerk hand the witness Exhibit F, please. I believe Exhibit F has been admitted.

THE COURT: Yes.

BY MR. CRITES:

Q. Dr. Ellis, is Exhibit F the data that you're referring to which breaks down the voting –

A. It's part of the data. Exhibit F was prepared by the county and indicate the voter breakdown between registered whites and registered Hispanic and also the number that actually voted in the '84 general elections, again broken down by race and by precinct.

Q. The voter abstracts that you referred to – are those the same voter abstracts that have been admitted by plaintiffs,

Exhibits 34 and 35?

A. I have not seen those Plantiff's Exhibits. Are those the (p. 486)
same abstracts that were supplied to me?

Q. I'll show you in just a second.

MR. CRITES: Would you hand him the Plantiff's Exhibits 34 and 35?

THE WITNESS: That is correct.

BY MR. CRITES:

Q. Those are the data that you used to make your analyses?

A. Yes. It lists all the races, the actual voting by precinct, and the outcome of each election, whether they are local elections or national elections.

Q. Are those two exhibits the data you that you used to compile your report?

A. That is correct. The actual vote count for each of the candidates was selected from this abstract.

Q. Okay. You have been qualified as a statistician. Recognizing the potential for showing things by statistics that may not seem apparent, may or may not even be true, do you utilize statistical techniques to guard against the potential for showing the validity of obviously untrue inferences or assumptions? Would you relate some of those?

A. One of the limitations that I noticed from the start and analyzed in voting patterns in Saguache County, although we have a fairly large number of voters, some 2,600 registered voters, this data is broken down, allocated among nine precincts. Now, that's a fairly small sample. You have to be (p. 487)
very careful in statistics in working with small samples.

In this case, I attempted to utilize techniques that would minimize the sensitivity of the results to small changes in the input data. If you're dealing with a sample of nine and you modify the data arbitrarily or in some manner, there is going to be substantial change in the quotations estimated in the results that you're going to

obtain. So in this particular case, I was very careful in handling the small sample.

The statistics textbooks are full of warnings that statisticians can prove anything with a small sample. We hear that four out of five doctors recommend, etc., etc., etc.. You may get four out of five doctors to agree on something, but an it's a lot more difficult to get 40 out of 50 or 400 out of 500 to obtain the same result. So in this case, the techniques that were utilized were intended from the beginning to minimize the distortion that can creep into the analysis due to the small sample.

Q. And using the techniques that you described, using the statistical experience background and knowledge that you have, and using the data that has been admitted into evidence, did you compile a report to be submitted to the Court to discuss your findings?

A. Yes, I have.

Q. Is that Exhibit A?

A. That's Exhibit A.

(p. 488)

MR. CRITES: We would ask that Exhibit A be presented to the Court and used by the Court to follow the testimony of Dr. Ellis.

THE COURT: Okay. Are you offering Exhibit A?

MR. CRITES: Let me offer it now as an exhibit, and then we'll go back and analyze the report further.

THE COURT: Do you have any objection?

MR. GARZA: No objections, your Honor.

THE COURT: Exhibit A is admitted.

BY MR. CRITES:

Q. Dr. Ellis, I think you indicated that you were asked to analyze the data with respect to whether there was an indication of polarization in the voting of Hispanics in Saguache County. After you received the data, was there any other obvious correlation which demanded to be analyzed in order to adequately analyze the data?

A. Well, I was asked to do an analysis of voting patterns. I'm not familiar with Saguache County politics. The data that I see in the candidates are just names to me. I did not want to perform a one-dimensional analysis, do just one correlation and try to draw a conclusion on the basis of that analysis.

I performed a variety of analysis – analyses. I looked at the data from a variety of viewpoints, then selected those variables which I found to be most statistically significant and the ones that were consistently able to explain (p. 489)
the voting patterns of Saguache County.

Q. What are the various factors which you feel are statistically able to explain the voting patterns?

A. After analyzing the data, some 15 different political contests in Saguache County, I performed six different analyses on each of those political contests, a total of 90 different analyses. And I looked at the various relationships and determined which of those were statistically

significant and which were found to be highly statistically significant, that were able to consistently and accurately predict or explain voting patterns in Saguache County.

Q. Would you explain why you – of all the political races that were involved in Saguache County, you selected the ones that you selected?

A. Well, the specific complaint in this case involved the office of county commissioner. And I thought it was very important to analyze as many of those cases as possible. I analyzed all cases for the office of county commissioner from 1978 to 1986. I even went back one year and picked up a race from the year 1976, although that analysis used an entirely different data base, pre 1978. There was only six or seven precincts in Saguache County.

THE COURT: I'm sorry. How many precincts?

THE WITNESS: Seven as opposed to the current nine. I had some data on registered voters and ethnic breakdown breakdown of the (p. 490) voters for the year 1972. The only data I had which showed the voter breakdown by precinct in each of the seven precincts, and that election result I analyzed for '76 involved an Hispanic candidate; so a total of 8 out of the elections analyzed – 8 out of 15 involved the office of the county commissioner. But 3 out of those 8 involved an Hispanic candidate.

I wanted to have more evidence to have a more balanced sample, to be able to observe voting behavior under various circumstances or conditions.

Q. Under what circumstances did you use registered voters as opposed to actual vote count?

A. In all cases, I've utilized registered voters, the reason being we're dealing here with a small sample; and I wanted the voted count in each of those precincts to be as maximum as possible, to provide some stability and some consistency in the analysis and interpretation of the results.

Q. Why did you not select any primary elections for analysis?

A. Well, the voter turnout in primary elections is some cases – some 30 percent, and that vote is split among many candidates, makes it extremely difficult to derive some stable relationships. The results are too volatile when you're using small vote count. So all the elections I analyzed involved general elections. Bigger voter turnout, a larger, stabler data base, talking about the registered voters. So I shied away from altering the basic data – the data basis that was (p. 491)
utilized in all the cases. I did not want to use the actual vote count, because in many cases that did not include the absentee vote because of – don't have a hundred percent voter turnout. You're dealing with the smaller sample, which is prone to larger errors.

Q. Okay. In making your analysis of who won and who lost and the significance of that, you did use actual vote count in each of the abstract reports?

A. When you're doing bivariate analysis, you have two variables. I'm referring here to the explanatory variable or the independent variable, what was used as the basis

of predicting the actual vote count for a particular candidate in Saguache County by precinct.

Q. And on – between page 5 and page 6 of your report, do you – did you construct a table of the names of the candidates?

A. That is correct.

Q. Of all the races that you analyzed?

A. There is a table of all the races that have been analyzed. As I said previously, a total of 15. Eight of them concern the office of county commissioner. Several others are for the – for local county office, and some are for state office. Seven of them involve the Hispanic candidates. The other eight involved either Republican against a white Democrat or a white Democrat against an Independent Hispanic.

Q. Then I'll refer you to the tables at the end of Exhibit A (p. 492) and ask you to go through those tables beginning with Exhibit A, which – Exhibit A to Exhibit A, which is the first table at the end of the report and ask you to describe briefly what that is. I think it's fairly self-explanatory, but –

A. You're talking about Exhibit Triple A?

Q. No, single A. It's titled, "Registered Voters by Party."

A. Well, you're referring to the graphic exhibits.

Q. Yes, the graphic exhibits.

A. The data was utilized to make the analysis. It's noted in Exhibits A through F. Exhibit A indicates the registered

voters by party. Now, this data is voter breakdown by political affiliation was provided by the Colorado Department of State; and it was included along with the voter breakdown by race to form the basic data base.

Q. And Exhibit B?

A. Exhibit B indicates the registered voters by race, white vs. Hispanics. It shows the vote count by precinct on the basis of race.

Q. And Exhibit C?

A. Exhibit C compares the registered Democrats vs. the registered Hispanics. It shows the distribution again of the count by precinct.

Q. Okay. Now, you're using the term "versus," which has a particular and perhaps peculiar meaning to lawyers, which may not be exactly the same meaning that you have in mind for your (p. 493)
analysis. Would you describe –

A. I'm using the term in a totally benign fashion. As a statistician, when we perform correlation analysis, you're correlating Variable X vs. Variable Y; so throughout, when you see the word "versus," does not imply anything derogatory. it says in a sense that we're correlating or performing a regression analysis of this variable against that variable.

Q. Or compared to, rather than against. Against also has a connotation –

A. Right.

Q. Okay. Would you go on to Exhibit D?

A. Exhibit D indicates the registered white voters by precinct.

Q. Exhibit E?

A. Indicates the registered Hispanic voters by precincts.

Q. Is there anything significant about the exhibit which that exhibit indicates about the data that you used?

A. The most troublsome of the data that was available was the number of registered Hispanic voters. We're dealing with a small sample, nine precincts. Looking at the distribution here of the Hispanic voters, four out of the nine precincts contain only 23 voters out of some 960 total registered Hispanic voters.

Q. Does that present a problem in statistical analysis?

A. Definitely, yes. It skews our sample here very, seriously because the allocation of voters by number, by precinct here, is severely skewed. As I said, Precincts 2, 3, 4, and 9 (p. 494)
contain a mere 23 registered Hispanic voters; and 1, 5, 6, 7, and 8 contain 97 percent.

THE COURT: Can I just interrupt, because I need to make sure I understand something. If you flip back to the graph that is entitled, "Registered Democrats vs. Hispanic –" it's Exhibit C. Dr. Ellis, for example, in Precinct 6, you've got 284 Hispanics and only 240 Democrats.

THE WITNESS: Yes, your Honor. This chart here has a special purpose. Later on, I'm intending to indicate that these two variables, registered Hispanics and registered Democrats, move in tandem. They're very closely related. And as previous testimony indicated, three out of

four Hispanics are registered Democrats, 75 percent. In fact, Hispanics make up 57 percent of the Democratic party. A small percent, 5 to 6 percent, some 67 registered Hispanics, are registered as Republicans, and the remaining portion, some 22 percent, some 188 voters, are registered as unaffiliated or independent.

THE COURT: But some of those registered Democrats that you have in this exhibit are non Hispanic.

THE WITNESS: Oh, definitely. We said 57 percent of the Democrats are Hispanic. The rest are non Hispanic or white.

(p. 495)

THE COURT: So all you're trying to do in this chart is show that there is some –

THE WITNESS: I intend to show later, your Honor, that the correlation between those two variables, registered Hispanics and registered Democrats, is extremely high. As a matter of fact, it's over 90 percent. They're essentially the same variable. You find this high correlation. I'm making the point that registered Hispanic voters in Saguache County are very closely identified with the Republican party – I mean with the Democratic party; and my analysis shows that the they vote primarily Democratic.

THE COURT: Again, let me just stay with this one moment so I understand it. For example, look at the precinct 7 as an example, 174 registered Democrats and 172 Hispanics. Is that –

THE WITNESS: That is correct, your Honor.

THE COURT: That 174 registered Democrats could be half Anglos and half Hispanics?

THE WITNESS: That's correct. This chart doesn't indicate anything of this nature here, but there is some 1,270 registered Democrats, 965 registered Hispanics. The difference would be obviously non Hispanic.

THE COURT: Go ahead.

BY MR. CRITES:

Q. Referring to Exhibit E, would you take a look at the number

* * * (p. 526)

THE COURT: Okay.

BY MR. CRITES:

Q. Yes. If you do need the exhibit to look at, let me know and we'll get it for you.

I believe you mentioned that you had calculated the – I think it's using Exhibit 3, the Plantiff's Exhibit 3 or 4, that the percentage of the Democratic party represented by Hispanics is 57 percent. Is that correct?

A. That's correct.

Q. Also, I believe in that table there is a tabulation of the number of Democratic registered voters and the number of Republican registered voters and the number of independent registered voters?

A. That's correct.

Q. Does the table indicate that the Democratic party is numerically the largest?

A. 45 percent of all registered voters in the – in my data base, something I assume similar to Exhibit 3 of the plaintiffs.

Q. And it wins – you said 25 percent?

A. 45.

Q. I'm talking about win rates now. The Democratic party wins something like – you said on the commissioner races, they win about 25 percent of the time?

A. 25 percent; and out of the 15 races I analyzed, they won some – close to 30 percent, about a third of them.

(p. 527)

Q. Given that data, is it statistically indicative that the Hispanics as Democrats have less opportunity to elect candidates of their choice under the present system of election than they would have if they would 56 percent of this single district?

A. Well, some of the most recent cases I analyzed, specifically the 1982 race, Abeyta vs. Hall – that was decided by some 53 votes; and then the one last year, Mr. Archuleta lost by some 22 votes – had in that – in those particular two cases, in one case had 26 voters shifted from one side to the other, the result would have been reversed. In the second case, had some 12 voters shifted from one side to the other, the margin there or loss was so slim. So in this particular case, what accounts for the loss of a candidate when the margin is so close by 22 votes –

Q. As a statistician, could you predict that, who would win or who would lose on those two races?

A. Not that close.

THE COURT: I'm sorry. Could he predict what?

MR. CRITES: Who would have won the race?

THE COURT: If what had happened?

MR. CRITES: In predicting the outcome of the election.

THE COURT: Okay. I thought you were still talking about the 56 percent district.

MR. CRITES: No.

(p. 528)

THE WITNESS: Well, what he was referring to, your Honor, at the present time, Hispanics make up 57 percent of the Democratic party. He was saying, well, if – have a better chance if they were a district with 57 percent of vote, would they have done better as opposed to what they've done in this particular case?

I have no way of determining that statistically. You just can't predict with such high degree of accuracy. The models I've used here, I can get as close as plus or minus 2 ½ percent of the vote, plus or minus 50 votes. I can't get it down to 22 votes.

BY MR. CRITES:

Q. Okay. as to the analysis that you have made statistically, do you find that the Hispanics vote as a bloc more strongly by race or by political party?

A. Well, the main issue in this particular case is whether the election results are racially polarized – whether the elections themselves and whether voting is polarized along racial lines.

Obviously, the first thing a statistician has to do to show that Hispanics vote as a bloc – and I believe both the plaintiffs' and my study indicates that Hispanics vote as a group in favor of Hispanic candidates. This is no big surprise. As a matter of fact, it's a mathematical necessity. Democratic candidates – excuse me – Hispanic candidates run as Democratic candidates. Hispanics make up the majority of the Democratic (p. 529)
party. So voting takes place along political lines. Since we find a high correlation between the Democrats and the votes received by the Hispanic candidate, we should find a high correlation between the votes received by the Hispanic candidate and the Hispanics. Now, this is a necessary but not sufficient condition to prove or disprove statistically voter polarization. But it does indicate that they vote as a bloc.

Now, the other question that begs to be asked: If the Hispanic voters vote as a bloc in favor of Hispanic candidates, what is their voting behavior when no Hispanic candidate is running?

Q. You analyzed several races in which only Anglos were running?

A. That's correct.

Q. Why did you do that?

A. We had to use a control group

Q. What do you mean by "control"?

A. All the cases were analyzed by the plaintiff – they involved races with the minority candidate, 10 of them. In this particular case, I wanted to observe the behavior of the Hispanic voters when both candidates running

were white and when one of the candidates running was Hispanic.

We established in this particular case that yes, there is statistically significant correlation between registered Hispanics and the votes Hispanic candidates receive. How do (p. 530)
the Hispanics behave at the polls, at the voting booths when both candidates are white? And I found that they vote Democratic regardless what the race of the Democratic candidate is. In other words, they find white candidates running on the Democratic party to be the candidates of their choice, and they support them just as strongly.

And some of the correlation coefficients I found are just as high when you compare Hispanics vs. the Hispanic candidate and when you compare Hispanics vs. the white candidate. So in the analysis here, we find that party affiliation, rather than race, is the primary consideration. And it's very difficult here to separate the two, because the Hispanic minority is closely associated with the Democratic party.

We said yesterday that three or four out of the Hispanic voters are registered Democrats. In fact, they make up 57 percent of the Democratic party. So when they vote for a Hispanic candidate, they're voting because they're Hispanics or they're voting because they're Democrats.

I have no way of separating that effect, but I found that they find white candidates to be the candidates of their choice when they run as Democrats.

Q. As a statistician, in your analysis of the races that you – that are available, if you analyzed only the races that involved an Hispanic, would your statistical analysis be (p. 531)
complete enough to rely upon for any purpose?

A. Well, if the voting behavior of the Hispanic minority was racially motivated, they should vote as a bloc –

Q. You're not answering my question. My question is on the subject of your control – you said you wanted a control.

A. Yes. I understand the question.

Q. Okay. Now, can you statistically analyze this kind of data without using a control and have your – have that be acceptable in the statistical analysis community?

A. Well, as I said earlier, I wanted to observe the behavior under both conditions; and that's the importance of the control group. We know Hispanics vote as a bloc when the Hispanic candidate is running. We discover that they vote as a bloc when a white candidate is running; so in this particular indication, we find no significant change in the voting behavior of the Hispanics when the ethnicity of the candidates changes.

Q. But would you have been able to tell that if you had done the kind of analysis that Dr. Brischetto did using only Hispanics? Would you have been able to tell what you just said?

A. In statistics, always we have to have two groups, the control group and the experimental group. In medical science, you do the same thing. You're testing the effectiveness of a drug. You give the actual drug to one group,

you give a placebo to the other group and compare the differences.

(p. 532)

In this particular case, I found that Hispanics vote Democratic regardless of the race of the candidate.

Q. Okay.

A. Had not that been the case, had I found that they changed or altered their voting behavior, they stay home or they reduce their voter turnout rates or do not vote for white candidates, that would indicate that the candidate was not the candidate of their choice.

Q. You answered my next question, which is whether the Hispanic community is a cohesive or like-minded group.

I'm going through the *Thornburg* checklist, so you're going to need to answer the questions as I put them to you here. The political cohesiveness of the Hispanic community.

I think you have described, but would you describe it in terms of political cohesiveness, because you've said they are politically cohesive; but are they politically cohesive because they're Democrats, or are they politically cohesive because they're Hispanics?

A Well, the majority – you're looking at two variables here that – you're talking about the Democratic party, some 1,207 registered voters, and 57 percent of them are Hispanic. They're so closely intertwined. I found them to vote primarily along party lines. They vote as Democrats.

As part of my analysis, I attempted to determine whether they ever cross over and vote for Republicans.

(p. 533)

Q. Yes.

A. In no case, I found such correlation; so –

Q. Hispanics don't vote for Republicans too much?

A. Democrats don't for Republicans, and vice versa.

Q. Republicans don't vote for Democrats?

A. That's correct.

Q. You're answering any next question already, which is does the data indicate that the white majority vote sufficiently as a bloc to usually defeat the Hispanic choice of its candidate?

A. Three points, three conditions I was looking for to determine whether voting was strongly affected by race. The first one we discussed, do Hispanics vote as a bloc, only for Hispanic candidates. The answer was no, they also vote for white candidates.

The second question, the more crucial question in this particular case: What is the behavior of the white majority, the white registered voters that make up 64 percent of the voters in Saguache County? It was essential in this particular case to observe their behavior under both conditions: How did they vote when the Hispanic candidate was running and how did they vote when both candidates that were running were white?

Now, in all cases analyzed, all 15 of them, we found a significant white crossover vote; and that has to be there

if a Democrat or Hispanic are to win any races. Democratic party controls 45 percent of the vote. Hispanics as a group control (p. 534)
36 percent of the vote. If they vote as group to make up the difference between those numbers and what is actually needed to go over 50 percent, there has to be a statistically significant crossover vote and large enough to – and turnout in the case Mr. Allen, in the case of Mr. Grant. That was indeed the case. It put them over the 50 percent mark, and it came awfully close to putting Mr. Archuleta last year – just loss by 22 votes.

The analysis I found, the behavior of whites, there is a statistically significant crossover vote when both candidates are white.

THE COURT: I think you need to define what you mean by "crossover," because when they're both white, you're talking about a crossover from independent to Democrat.

THE WITNESS: From Republican to Democrat, could be from independent to Democrat, could be from white Democratic, analyzing the race – the election results on the basis of race, your Honor.

THE COURT: But when you're talking about two whites running, what you're doing when you're talking about crossover –

THE WITNESS: I was talking about the crossover in favor of the white run under the Democratic party for the Democratic candidate; and I wanted to see what happens when the Democratic candidate is Hispanic. Do whites alter their voting behavior? Do they withhold their vote,

or do they shift their vote to defeat or to frustrate the attempts by the Hispanic (p. 535)
minority to elect a candidate of their own race? I found no such behavior, your Honor. In all of the cases analyzed, there is significant white crossover vote in favor of Hispanic candidates. In the last two elections, it came awfully close to putting those candidates on in the win column.

BY MR. CRITES:

Q. If you are using the term "statistically significant," is 22 votes out of 2,000 votes statistically significant?

A. I believe not.

Q. Is 53 votes out of some 2,000 votes statistically significant?

A. Again, it would depend on the particular race and the – when we say, "statistically significant," we're trying to predict a variable here, and we're using various explanatory independent variables. Should we include those in the predictive equation, regression analysis? Statistical significance, once you reach a critical point, becomes statistically significant, like you say an r square of 67 percent is statistically, significant. But you can't prove anything with that. It's still very, very low. What you have to look at are the – is there a wide crossover vote that's large enough in absolute terms, in number of votes, to push a candidate over the – the win column.

THE COURT: Let me try this just oversimplified: If the Democrats are 45 percent and a Democratic voter (sic) wins – (p. 536)

and in this case, only two have won, Grant and who is the other one – Allen –

THE WITNESS: That's correct.

THE COURT: – and Grant won by 51 percent, then can't you sort of just assume that he received 45 percent of the vote from Democrats, or close to that, and the balance from independents?

THE WITNESS: Well, part of the Democrats, your Honor, 57 percent are Hispanic and the other 43 percent are white. When I'm talking about the white crossover vote, here I'm analyzing the case on the basis of race. After they got the Hispanic vote –

THE COURT: I'm talking about Grant, who is white.

THE WITNESS: True. 37 percent of the Democrats are white. i'm saying that the whites as a race, not the whites as part of the Democratic party, when we're talking about the 64 percent of the vote which is registered whites vs. the 36 percent which are registered Hispanics and we're analyzing the race – the particular election along racial lines, we're saying after they get the vote from the Hispanics, do enough white Democrats, do enough Republican whites, do enough independent whites cross over to vote in favor of the Hispanic candidate, who usually runs under the Democratic party.

THE COURT: I thought you were telling me, though, that the statistics are more significant, the relationships, to (p. 537)
show that the Democrats vote for Democrats; and I'm accepting that: that the Democrats vote for Democrats.

THE WITNESS: That's correct. I want to look at the whites as a group, take the 64 percent of them and see if that variable, taken along with the Hispanics, can do a better job of predicting the votes an Hispanic candidate gets if you look at Hispanics alone. That was the objective: that white crossover votes – do whites in significant numbers vote for Hispanics, because if we had extreme polarization, only Hispanics vote for Hispanics, then the vote would be 64 percent to 36 percent, your Honor.

I'm saying in this particular case, if an Hispanic candidate gets 49 percent, the difference between the 36 percent and the 49 is the white crossover vote.

THE COURT: What effect would it have, since you're talking about registered voters – what effect does it have that in a certain election, maybe all of the registered voters who are Hispanic vote but not all of the registered voters who are not Hispanic vote?

THE WITNESS: Come again with that, your Honor.

THE COURT: You're talking about registered voters.

THE WITNESS: That's correct.

THE COURT: And there may be a difference as to how many of the registered voters actually vote.

THE WITNESS: That's correct.

(p. 538)

THE COURT: So can't the difference be explained on the basis that if an Hispanic runs, it might encourage all of the Hispanic registered voters to actually go to the polling plays and vote? We've heard testimony that they

actually get out the vote, but not all of the registered voters who are not Hispanic vote. How do you account for that?

THE WITNESS: The voter turnout rates, your Honor, in the data I looked at, 1984, we had the voter turnout rate of over 80 percent: 83 percent for the whites, 81 percent for the Hispanics.

I believe the plaintiffs – they had voter turnout rates for Hispanics for '82, '84, and '86. In 1984, there was no Hispanic candidate running; but the voter turnout rate was the same in '84 as it was in '82 as it was in '86 for the – that is, the percent of the total vote they were controlling was still 36 percent of the total, so they turned out at the same rate as the whites.

THE COURT: Is there any difference in the turnout rates between the Hispanics and whites when there is an Hispanic running as opposed to when there is two whites?

THE WITNESS: That's what I just said. In 1984, there were no Hispanic candidates. Hispanics –

THE COURT: And both the turnout rates were the same as they were before.

THE WITNESS: That's correct, after the correction we (p. 539)
made yesterday. The data the for 1984 did not include absentee votes. '82 and '86, they did, but I believe that was –

MR. GARZA: Your Honor, I'm afraid I'm going to have to object to that particular aspect of the testimony. There was no correction to that particular exhibit.

THE COURT: What exhibit is it?

MR. CRITES: Exhibit 3, I believe.

MR. GARZA: Exhibit 3.

MR. LUBOW: Exhibit 4.

MR. GARZA: Exhibit 3.

THE COURT: I don't think 4 was ever admitted, was it?

MR. GARZA: Yes, I believe it was, your Honor, by stipulation.

THE COURT: Let's see.

BY MR. CRITES:

Q. Did you analyze Exhibit 4 on the – of the plaintiffs regarding the three years in which the Hispanic turnout was tabulated?

A. Yes, and I noticed the –

Q. And what did your – what did – what data did you examine in order to check the figures on the Plantiff's Exhibit 4?

A. Well, I have the data for 1984, and I knew the voter turnout rates and what they were. The plaintiffs had shown that there had been a drop in voter participation by Hispanics in the '84 race.

(p. 540)

Q. Yes.

THE COURT: Now that Charlotte is here, because I'm having problems finding my exhibit list, do you show exhibit 4 as being admitted, Charlotte?

THE COURTROOM DEPUTY: 4, no.

THE COURT: Pardon?

THE COURTROOM DEPUTY: No.

THE COURT: I don't think 4 was ever offered.

MR. CRITES: We don't have to discuss it, if it's not in evidence.

THE COURT: It's my memory that it was not. It was never offered and never admitted.

MR. CRITES: If it is, we may want to put on some more evidence; but since Exhibit 4 was never put on in evidence, we'll leave it alone.

THE WITNESS: Your Honor, I cannot answer your question. That was the only information I had seen. My data base concerns the year 1984, and I found the year 1984, 36 percent of those that voted were Hispanic. If we have any other data for any other years, we can make a determination; but for '84, the breakdown was 36 percent to 64 percent.

THE COURT: Are there any exhibits that show the turnouts in the various years? Is that part of any of the exhibits? I can't recall.

MR. CRITES: I guess the only evidence we have at this (p. 541)
point is by race; and since we feel that Exhibit 4 is in error we're not willing to offer it to the Court.

MR. GARZA: Your Honor, if I may, my records indicate that plantiff's Exhibit No. 5 was offered and admitted. I may be wrong; but if I'm correct, then that particular exhibit does have turnout rates.

MR. CRITES: Look at 5.

THE COURT: Okay. Let's look at 5, because I think I agree: I think 5 was admitted. 5 is admitted.

MR. CRITES: Would you hand Dr. Brischetto (sic) Exhibit 5.

THE COURT: Wait a minute. Doesn't – doesn't Dr. Ellis actually have a breakdown on his exhibit?

MR. CRITES: Exhibit F shows –

THE COURT: On Exhibit F?

MR. CRITES: Shows the 1984 today.

THE WITNESS: Exhibit Data 2, your Honor – that shows the actual count of voters and the turnout and the —

THE COURT: Okay. I guess my only question to Dr. Ellis was whether his figures take into account the actual turnout as opposed to the registered voters and is there a difference, depending on whether two Anglos run or an Hispanic and Anglo.

MR. CRITES: Has he answered that to your satisfaction?

THE COURT: And you're saying there is no difference.

* * *

(p. 543)

THE WITNESS: Yes. The only other data that I have seen indicate in the comparative voter turnout rates for the year 1982 and '84 and '86 is Plantiff's Exhibit 5, your Honor.

BY MR. CRITES:

Q. Why don't we stick with your exhibits. Do you have any other data?

A. No, I do not.

Q. That is the only data to indicate whether the percentage of turnout is the same as the percentage of registration?

A. Well, if you look at Data 1, which is the 1972 data base with the 7 precincts, your Honor, the registered voter breakdown is essentially the same, roughly the same there: 38 percent Hispanic, 62 percent white; and that corresponds fairly closely to the '84 data base.

Q. This is voter turnout you're talking about in both cases?

A. For 1972, actually, just the people registered to vote. We don't know how many showed up. We don't know the actual vote count.

Q. So the actual voter turnout as compared with the actual voter registration – that's her question. Is the only exhibit you have, then, Data 2?

A. That's correct. This is the data we used throughout for this Data 2, which was provided by the county.

Q. And the correlation between the turnout and the registration, the percentage of Hispanics who are registered (p. 544)
voters and the percentage of Hispanics who turned out to vote, how do those corrleate?

A. Very, very closely together.

THE COURT: Can you look at Data 2 and explain something to me on your percent line, where you have the number voting?

THE WITNESS: Yes.

THE COURT: It says 71 percent white – is that correct – and 29 percent Hispanic?

THE WITNESS: Yeah. Those voting at the polls, your Honor, does not include the absentee vote; and farther down I amend the absentee vote. Turns out one-third of the Hispanics vote absentee. That's a pretty high rate. And 10 percent of the whites vote absentee. When you include the total, it comes out to 64 percent vs. 36 percent.

THE COURT: Oh, I see where you got that.

THE WITNESS: And plantiff's Exhibit No. 5 –

MR. CRITES: Do not use Exhibit 5. Thank you.

THE COURT: Well, let's use 5.

MR. CRITES: All right.

THE COURT: Are the figures close to the figures on 5.

THE WITNESS: The data they have for '84, your Honor, apparently is the number voting at the polls, does

not include the absentee vote, because otherwise the voter count is too low. When I include the absentee vote in there, the turnout was the (p. 545)
same for '82 and for '86.

THE COURT: Well, you had indicated in your opinion that when two non Hispanics are running that Hispanics did not stay home; they went out and voted in the same numbers.

THE WITNESS: That' correct.

THE COURT: Does this verify what you said?

THE WITNESS: That's correct, your Honor, because I found no evidence of that, because the correlations and the analysis I preformed show that they're just as strong when the Hispanic candidate is not running; that the Hispanics vote straight Democratic, regardless of the ethnicity of the candidate.

THE COURT: Okay. Thank you.

Go ahead with your questions.

BY MR. CRITES:

Q. With the exception that you just noted, do your data and conclusion of the predictability of Hispanic, as you say, vs. Hispanic candidates agree with the data and predictability that was found by the plaintiff?

A. I reviewed the current statistical analysis by my colleague, Dr. Brischetto.

Q. As a general rule, with an exception we'll go into in just a moment, does your data agree on the predictability of Hispanic voters with Dr. Brischetto?

A. Some of the cases Dr. Brischetto analyzed were the same (p. 546)
ones I did, utilized essentially the same techniques except to transform the data into percentages; and some of the correlation coefficients and the r squares were the same I arrived at, with the one notable exception.

Q. Okay. Let's get into the exception now. What is the major exception to that?

A. His analysis he did about the election of '86 for Mr. Archuleta vs. Mr. Freel –

Q. Okay, now. Let me find that before you proceed with it. I believe you're discussing your Exhibit HH with the Exhibit 14 of the plaintiff, which had several pages. So we'll need to find –

A. I believe it's page 3 that contains the scatter plot and the graph itself.

Q. Okay. Page 3 of Exhibit 14? Is that the one you're talking about?

A. On top it says 1986 general election for county commissioner, District 3, Saguache County, dated 11-9-87.

Q. On the left-hand side of that exhibit, it says, "Votes for Archuleta." Is that the one?

A. That's correct.

Q. And then on the bottom, it says, "Proportion Spanish Surname of Votes"?

A. That's correct.

Q. Would you explain the difference between your analysis of (p. 547)
that particular race and the analysis by Dr. Brischetto?

A. Dr. Brischetto is using a slightly different predictive variable. Apparently he did not have the number of registered Hispanic voters, so he used the – the number that actually voted.

Q. Okay.

A. And furthermore, he converted a raw data into percentages in the given precinct; so what he's predicting is the percent of vote received in each precinct in favor of Mr. Archuleta vs. the proportion of total number of voters that were Hispanic.This is the only case in those areas where we analyzed the same cases that there are substantial differences in his conclusions and the conclusions I reached regarding this particular race.

Q. Would you explain from your statistical background the methods that were used to form this exhibit and the – the percentage of error predicted by Dr. Brischetto in this exhibit as to how that would relate to perhaps the reason for the difference.

A. Dr. Brischetto performed, utilized the same statistical techniques, regression correlation analysis. The major change and major difference between his approach and mine, he converted the actual data, the raw vote count in each precinct, into percentages before he performed the analysis.

Q. From a statistical point of view, from the point of view of a statistical analyst, is that good procedure?

A. That would depend on the situation. This is a special case (p. 548)
here.

Q. Why?

A. As long as we're using the number of Spanish registered voters – we got nine precincts. As we stated earlier, four out of the nine precincts contain only three percent of the Hispanic vote, actually 278 registered voters in Precincts 2, 3, 4 and 9. So this data base, number of Spanish surnamed voters, is skewed in this particular case. If we had a large sample size, maybe it wouldn't make a big difference how we derived it, whether we gave special treatment for this four precincts with the very little vote, if it were 4 out of 60 or 4 out of a hundred. But in this particular case, we're talking about almost half of the precincts; that the sample is so skewed now – that's not Dr. Brischetto's fault. This is the actual data we have to work with.

In this particular case, if you transform the data in a different form, as he has done, from votes into percentages, I believe it seriously biases the importance of these 4 precincts in the analysis. They only have 3 percent of the vote vs. the other five that have 97 percent; and he has done that before he entered the data on the analysis – he has performed some weighting after the analysis, but I have difficulty with the – in this particular case with the particular transformations he used. As a result, the accuracy of his prediction – predictions from this analysis contains a (p. 549)
large – very large margin of error.

Q. Can you tell that from looking at his work?

A. Yes. I –

Q. How do you do that?

A. I have done two analyses here side by side using his data. The equation he calculated attempting to predict the number of votes Mr. Archuleta got –

Q. Okay.

A. – plus or minus the error. And then I done the same using my equation, using registered Hispanics as the predictive variable.

If I may proceed to the easel to demonstrate the two differences –

Q. Hold on just a minute, Dr. Ellis. This may take a little time to put on the –

THE COURT: Why don't we take a recess and he can put it on during the recess.

MR. CRITES: Thank you, your Honor.

(The Court was in recess from 11:10 till 11:30 a.m., and when reconvened, the following proceedings were had and entered of record:)

THE COURT: Okay. Go ahead.

BY MR. CRITES:

Q. Dr. Ellis, we were discussing page 3 of Exhibit 14; and the question was did you find a significant error, what you (p. 550)
consider from a statistical point of view to be a significant error in the data on that page 3?

A. Both Dr. Brischetto and I developed regression equations. That's supposed to predict or explain the votes received by a particular candidate in Saguache County. This particular case, I'm comparing Dr. Brischetto's equation, which is based on the data after it has been converted into percentages, instead of correlating the number of votes received by Mr. Archuleta vs. the number of Spanish surnamed registered voters, or those that actually voted.

Q. And after you did that comparison, did you find an error?

A. The error is in the –

Q. So you did find one?

A. No. The error is in the predictability of the results. When we develop a regression equation, we want to be able to say, I predict that the votes received by such and such candidate are . . . I want to be 95 percent confident – some confidence level that it's going to be such and such, plus or minus a certain amount of error. And the error here was estimated in Dr. Brischetto's analysis.

Q. What was that error?

A. Very wide. The term "standard error of the estimate," which has to be used to determine the reliability of the forecast of the prediction we're making, the SE of estimate, Dr. Brischetto estimates from his estimate to be 7.3 percentage points, .07374. (p. 551)

Q. And that is found on page 3 where?

THE COURT: I see it, Counsel.

MR. CRITES: Okay.

THE WITNESS: Line next to the bottom. So what I have done – This is an analysis Dr. Brischetto prepared. We got the same correlation coefficients, the same coefficient determination, and we're attempting to predict the number of votes Mr. Archuleta received using both methods.

BY MR. CRITES:

Q. Okay. Now, have you drawn on the easel there your analysis of the two analyses?

A. That's correct. Down at the bottom, I'm indicating the regression equation I estimated in predicting the votes for Mr. Archuleta, where the explanatory variable used is the number of registered Democrats. So I have Y equals 1 – that's 1 vote plus –

MR. CRITES: Would it be all right for the witness to go to the easel to point out –

THE COURT: Sure. Go ahead. Step down.

THE WITNESS: Here's the equation I estimated in Exhibit HHH, your Honor, to predict the votes received by Archuleta on the basis of number of Democrats. I found the correlation coefficient of 92 percent and an r square of 85 percent; and this is the linear equation, the result of the regression analysis –

* * *

Supreme Court, U.S.
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No. 89-353

In the Supreme Court of the United States

OCTOBER TERM, 1989

JENNIE SANCHEZ, ET AL., PETITIONERS

v.

WILLIAM BOND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the district court's determination, in a case arising under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, that petitioners failed to prove that the minority group was politically cohesive and that the minority's candidates of choice were usually defeated by the majority's bloc voting, was clearly erroneous.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioners are Hispanic voters from Saguache County, Colorado. They alleged that the at-large system of electing county commissioners violated Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973.[1] After trial, the district court dismissed petitioners' complaint, and the court of appeals affirmed. Pet. App. 1-20.

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[1] A violation of Section 2 "is established if, based on the totality of circumstances, * * * members [of a racial or language minority group] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973.

1. Saguache is a rural county of 3,000 square miles in central Colorado. Its population in 1980 was 3,935, of whom 41% (36% of the voting age population) were Hispanic. Pet. App. 2-3. The Saguache County Commission consists of three commissioners. The commissioners are chosen in staggered, partisan elections for terms of four years. Elections for the commission are at-large, though there must be a commissioner from each of the three residency districts. Pet. App. 3; Tr. 271-272. Hispanics, who are concentrated in the City of Center, are sufficiently numerous to elect one commissioner if the county were divided into three single-member districts. Pet. App. 9, 28-29.

Witnesses testified that the land in Saguache County is owned principally by Anglos and worked by Hispanics. In the past, Anglos and Hispanics lived, went to school, and worshiped separately. Tr. 29-37. Many economic, educational, and political issues continue to separate the Anglos in the county from the Hispanic community. Tr. 47-48, 136-156. Petitioners' expert, Dr. Robert Brischetto, testified that a disproportionate number of the county's Hispanics live below the poverty line, have little education, and are unemployed. He attributed these effects to past discrimination. Tr. 299-305.

The Democratic Party is the county's plurality party, accounting for roughly 45% of the registered voters. Half of the remainder are registered Republicans and half Independents. Pet. App. 28; DX F (Ellis Report), chart "Data-2". About 75% of the registered Hispanic voters are Democrats, and they constitute 57% of all registered Democrats in the county. Tr. 367, 389, 494-495.

Hispanics have lost every contested general election for county office and state legislature that they have entered since 1972, including three for the County Commission. PXs 9, 11, 34. On the other hand, some of these elections have been close, and Hispanics have won some uncontested elec-

tions. In 1986, Anglo candidate Freel won election to the County Commission with 22 votes more than Hispanic candidate Archuleta. PX 34. The 1982 contest between Abeyta and Hall for the Commission seat was also fairly close, Hall receiving 53 votes more than Hispanic candidate Abeyta. *Ibid.* Two Hispanics succeeded in uncontested races for county sheriff, one of them (Barela) at some time before 1972 (Tr. 47) and the other (Chavez) in 1974. Tr. 21; PX 34. In addition, there was testimony that, prior to 1972, an Hispanic, Gloria Belluni, was elected to two four-year terms as county clerk and recorder. Tr. 20-21, 79. The record is unclear whether Ms. Belluni was opposed or unopposed.

Petitioners' expert, Dr. Brischetto, analyzed ten county-wide elections between 1976 and 1986 (three of them Democratic primaries) in which Hispanics ran head-to-head against Anglo candidates. In every instance but one the voting was severely polarized by ethnicity and the Hispanic candidate lost (PX 14).[2] Hispanic support for Hispanic candidates ranged from 66% to virtually 100% while Anglo support for Hispanic candidates ranged from 17% to 27%. Hispanics supported Hispanic candidates by an average of 87%, and Anglo support for Hispanic candidates averaged 21%.[3] Based on this analysis, Dr. Brischetto concluded that Anglos voted as a bloc in sufficiently large numbers to defeat candidates preferred by Hispanic voters. Tr. 399-400.

Respondents' expert, Dr. Ted Ellis, testified that Hispanics in the county vote as a bloc for the Democratic

---

[2] The exceptional election in this group was the 1982 Democratic primary in which three candidates vied for the nomination for County Commission, two of them Hispanic. One of the Hispanics, Abeyta, won the primary and went on to lose in the general election. See Pet. 14.

[3] This calculation omits, as to the Anglo vote, the primary noted in footnote 2. In that one election, the cumulative Anglo vote for the two Hispanic contenders amounted to 55%. See Pet. 14.

candidate regardless of whether that candidate is Hispanic (Tr. 529), but that the Anglo "cross-over" to the Democratic candidate is more significant when the candidate is Anglo. Tr. 533-536. Since 1972, Anglo Democrats have run for the County Commission in nine races and won four times. In addition, Democrats have been able to win in three of 14 contested elections for other county offices (sheriff, district attorney) during the same period (PXs 9, 11, 34), giving them an overall win rate of seven out of 23 candidacies.

Respondents' witness Gomez testified that, when the Democratic Party nominated a candidate without a primary, the candidate had to have at least the passive support of the party's dominant Hispanic faction. Tr. 659. According to Gomez and respondents' witness Keith Edwards, several of the successful Anglo Democrats were actively supported by Hispanics. Tr. 688-689, 748-749, 758-759.

Furthermore, Mr. Gomez testified that the Hispanics in Saguache County were not monolithic in their political views. He ran against Ulie Sanchez for the Democratic nomination for the County Commission in 1976 and lost. Tr. 684. He testified that he and other Hispanics, as well as Anglo Democrats, had refused to support every candidate supported by the "Chicano" clique led by petitioner Jennie Sanchez. Tr. 637-642, 654-660, 674-678.

2. The district court, rendering an opinion from the bench, held that petitioners had failed to prove a Section 2 violation. Pet. App. 23-28. Of the three major factors necessary to make a threshold case under *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986), the district court found only one in petitioners' favor, *i.e.*, that they were sufficiently numerous and geographically compact to control one of three single-member districts. Pet. App. 28. The district court was unpersuaded that the plaintiffs had demonstrated either that Hispanics were politically cohesive, or that

Anglos voted sufficiently as a bloc usually to defeat the candidates of choice of Hispanics. *Ibid.*

With respect to the political cohesion of the Hispanic community, the district court credited the testimony of Mr. Gomez that Hispanics were not politically cohesive but constituted a number of different factions. Pet. App. 25, 28. The district court gave no other reason for rejecting petitioners' statistical evidence of Hispanic cohesiveness.

The district court mentioned five factors in support of its finding that petitioners had not proven that Anglos voted as a bloc in sufficiently large numbers to defeat the choice of the Hispanic population. First, the court found that Anglo candidates Grant, Allen, and Edwards – all of whom the court found to have been supported by Hispanics – had been elected County Commissioner in races against other Anglo candidates. Pet. App. 24-25. Second, the court found that Hispanics had won county-wide races in which they had run unopposed. Pet. App. 24. Third, the court found that, although a Hispanic candidate had never defeated a white candidate for county commissioner, Hispanic candidates Archuleta and Abeyta had come very close – within 22 and 53 votes, respectively – to winning a seat. *Ibid.* Fourth, the court found that Hispanics "control" the county Democratic party – the plurality party in the county. Pet. App. 24, 27. Finally, the court found that Hispanics generally were politically active in the town of Center – where they constituted a majority of the population – and had won city government elections there. Pet. App. 27. Thus, while the court agreed that Hispanics had been the victims of discrimination in the past (Pet. App. 23), it did not see that history as having any adverse impact upon the present ability of Hispanics to participate in, and have an impact on, the political process.

3. The court of appeals affirmed the decision of the district court. Pet. App. 1-20.

a. With respect to "cohesiveness," the court upheld the district court's reliance on Gomez's anecdotal testimony and criticized petitioners' statistical analysis. The court recognized that political cohesiveness exists "when there is a consistent relationship between the race of the voter and the way in which the voter votes," regardless of the underlying causes of this correlation. Pet. App. 10. However, although statistical evidence concerning such a correlation was held to be "highly relevant" (Pet. App. 11), the court found nothing in *Gingles* "to suggest that a trial court is *prohibited* from considering lay testimony in deciding whether a minority group is politically cohesive" (Pet. App. 12). Therefore, the court of appeals held that it was not error for the district court to rest its finding of lack of political cohesiveness on the lay testimony of Mr. Gomez. Pet. App. 11.

In any event, the court found fault with petitioners' statistical analysis. It noted that the district court found the analysis to be "somewhat unreliable" because the statistical evidence did not include an analysis of the Anglo-Anglo elections. Pet. App. 17. In addition, the court of appeals noted that the district court might properly have considered petitioners' statistical analysis to be "of limited value" because only three of the ten elections analyzed were races for county commissioner—the body whose electoral machinery was at issue in the suit. *Ibid.* Of the remaining seven races, one was a state-wide primary election, four others were elections for state representative to represent a five-county area, and the two remaining elections were county-wide races.[4]

[4] Specifically, the seven elections included one state-wide Democratic primary race for university regent, three general elections for state representative and one primary for state representative in a five-county area that included Saguache County, one general election for county treasurer, and one Democratic primary race for county commissioner. See Pet. 13-15.

Ibid. In light of these perceived difficulties with petitioners' statistical proof, the court concluded that the district court's factual finding that petitioners failed to prove political cohesiveness was not clearly erroneous. Pet. App. 17-18.

b. The court of appeals also sustained the district court's finding that, under the totality of the circumstances, candidates of choice of the Hispanic community for the County Commission are not usually defeated by Anglo bloc voting. To be sure, the court noted, "the lack of success of Hispanic candidates is a strong factor tending to show vote dilution." Pet. App. 19. The court held, however, that the district court's factual finding that there was no clear pattern of Anglo bloc voting sufficient to defeat Hispanic-supported candidates was not clearly erroneous. A number of factors, the court indicated, supported this conclusion.

First, the court determined that the district court properly took into consideration the election of unopposed Hispanic candidates in determining that there was no clear pattern of defeat. The court recognized that *Gingles* had warned that claims ought not be foreclosed on the basis of election of unopposed minority-supported candidates alone. But because in this case "[t]he election of unopposed Hispanics was only one of several factors leading to the [district] court's findings on vote dilution," the district court had not erred. Pet. App. 13.

Second, the court of appeals adverted to the district court's finding that the two extremely close elections for county commissioner in which Hispanic candidates were defeated by Anglo candidates "indicated to the [district] court that Hispanics have the ability to elect commissioners under the at-large system currently in use in the county." Pet. App. 9.

Third, the court of appeals found that Anglo-Anglo elections too can be legitimately counted among the "totality of the circumstances" in determining whether a minority

group can elect candidates of its choice. Pet. App. 15. The court recognized that "the success of certain Anglo candidates played a significant part in the [district] court's finding that vote dilution had not occurred." Pet. App. 14. Reliance on this factor by the district court was within the district court's discretion, "so long as one of the Anglo candidates can be considered a preferred candidate of the minority group." Pet. App. 15-16. And, on that point, the court of appeals upheld the district court's finding that one of the Anglo candidates in each of the three Anglo-Anglo elections was indeed the choice of the Hispanic voters. Pet. App. 18.

DISCUSSION

The opinions below are somewhat opaque, and it is therefore difficult to determine the extent to which the holdings in this case may have general applicability sufficient to warrant further review. The opinion of the court of appeals appears generally to state correct legal principles in no conflict with the decisions of this or any other court. The court's application of those principles, on the other hand, is more problematic. However, given the variety of factors on which the court relied in affirming the district court's judgment – and the clearly erroneous standard under which the district court's factual findings are to be reviewed – it is not clear that any errors the court may have committed in applying the law to the facts of this case would have altered the result. On balance, the decision of the court of appeals appears not to be of sufficient breadth or importance to warrant further review.

1. In *Gingles*, this Court explained that "cohesiveness" of the minority group pertains to its voting behavior. Unless the minority group votes as a bloc, "it cannot be said that the [at-large] electoral structure thwarts distinctive minority

group interests." 478 U.S. at 51. Conversely, a minority group will not benefit as a group from being the majority in a single-member district if its vote is highly fragmented. The determination of "cohesiveness," therefore, cannot be made apart from the analysis of racial bloc voting. See, *e.g.*, *Gomez* v. *City of Watsonville*, 863 F.2d 1407, 1416 (9th Cir. 1988) ("socioeconomic disparities and differences of political opinion within [the minority] community * * * are only relevant to the extent that they reflect differences in voting behavior"), cert. denied, 109 S. Ct. 1534 (1989); *Campos* v. *City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) (determination of cohesiveness "is not an inquiry to be made prior to and apart from a study of polarized voting, * * * because the central focus is upon voting patterns"), cert. denied, 109 S. Ct. 3213 (1989).

a. The Tenth Circuit understood that the inquiry into political cohesiveness is an inquiry into "whether in fact the minority votes as a bloc." Pet. App. 10. The court recognized that statistical evidence can be "highly relevant" to the issue of political cohesiveness, although a district court may also reasonably rely on lay testimony in appropriate circumstances. The court recognized that the district court held that in this case "political party plays a very strong role in the results," but also noted that there was "no indication that the [district] court found plaintiffs' statistical evidence * * * to be insignificant because it could be explained by party affiliation." Pet. App. 11. In all of these respects, the court appears to have correctly stated the legal principles guiding the inquiry into political cohesiveness.

The court of appeals affirmed the district court's determination of lack of political cohesiveness based on a combination of two factors: lay testimony, which the district court found to be credible, that political cohesiveness was lacking, and weaknesses in petitioners' statistical showing. The correctness of the court's decision in this respect hinges

on the strength of petitioners' statistical evidence. In the presence of an unrebutted statistical showing that the minority group in fact votes as a bloc, it is difficult to see how anecdotal testimony of the sort at issue here from a single lay witness could be sufficient to support a finding of lack of political cohesiveness. If petitioners' statistical evidence were weak, however, the district court's reliance on Mr. Gomez's testimony concerning factionalism in the Hispanic community, see Pet. App. 11, 17, may have been appropriate.

b. The court of appeals suggested that the district court properly gave weight to the lay testimony because petitioners' statistical evidence on cohesiveness ignored (1) elections in which Anglo candidates were sponsored by Hispanics and (2) included only a small sample of three elections for county commissioner. As an analysis of petitioners' evidence in this particular case, the opinion of the court of appeals may well be mistaken.

With respect to the elections in which Anglo candidates were sponsored by Hispanics, there was nothing in the record to indicate that Hispanics do not vote as a bloc in Anglo-Anglo elections, just as they do in Hispanic-Anglo elections. Indeed, the findings of both courts that three successful Anglo candidates were candidates of choice of the Hispanic community strongly suggests that Hispanics *do* vote as a bloc in Anglo-Anglo elections. Moreover, even if analysis of Anglo-Anglo elections showed a more fragmented Hispanic vote, it would not be at all clear that a conclusion of lack of political cohesiveness would follow. For the conclusion might as well be drawn that in such elections—unlike in elections pitting Hispanic candidates against Anglo candidates—the Hispanic community was simply offered no candidate of choice. See p. 14, *infra*. Thus, omission of statistics on Anglo-Anglo elections should not have been regarded as a determinative factor in the

analysis of political cohesiveness in this case. That leaves the court of appeals' conclusion that petitioners' sample of three elections for county commissioner was too small to produce reliable results.

Petitioners presented statistical analyses of ten elections in this case. See Pet. 13-15. The court of appeals stated that the district court may have properly considered evidence of seven of the ten elections, however, to be of "limited value" (Pet. App. 17), because they were elections for offices other than county commissioner and therefore not conducted under the "standard, practice, or procedure" (42 U.S.C. 1973(a)) being challenged in this case.

Results of "exogenous" elections—elections held for offices other than the one whose electoral machinery is being challenged—should not automatically be discounted. Because the major issue in determining political cohesiveness is the voting behavior of the minority community, there is no reason to ignore an election that reflects such voting behavior. The fact that five of the elections analyzed here were conducted in political units larger than the county does not automatically decrease the significance of the evidence relating to those five elections, because the county's vote was isolated and analyzed separately. See note 4, *supra*. Absent any argument that the voting behavior of the minority community in the larger elections was different from that in elections for county office, such voting behavior—along with voting behavior in the two exogenous county-wide general and primary elections—should have been considered. See *Citizens for a Better Gretna* v. *City of Gretna*, 834 F.2d 496, 502-503 (5th Cir. 1987), cert. denied, 109 S. Ct. 3215 (1989); *Westwego Citizens for Better Gov't* v. *City of Westwego*, 872 F.2d 1201, 1208-1210 (5th Cir. 1989); *Solomon* v. *Liberty County*, 865 F.2d 1566, 1575-1578 & n.15 (11th Cir. 1988).

The court of appeals did not state that the district court could properly have ignored the exogenous elections, but rather that the trial court "may have considered these elections to be of limited value" (Pet. App. 17). Although, for the reasons just discussed, these elections were of more than "limited value," whether such discounting was appropriate on the particular facts of this case does not warrant further review. The courts of appeals are generally in agreement that exogenous elections may be sources of important evidence in Section 2 cases, although the weight to be given such evidence may vary with the facts of each case. The Tenth Circuit's decision in this case, which expressly states only that the district court may have considered the exogenous elections to be of "limited value," does not depart so clearly from the consensus of the courts of appeals on the correct legal standards that it creates a conflict among the circuits requiring resolution by this Court.[5]

2. The court of appeals' holding that petitioners had not shown a pattern of racial polarization and Anglo bloc voting sufficiently large usually to defeat the Hispanic-preferred candidate raises more complex issues. There were two primary bases for this holding.

a. The court of appeals appears to have regarded the fact that there were unopposed Hispanic candidates as one factor demonstrating the absence of Anglo bloc voting usually sufficient to lead to defeat of the Hispanic-preferred candidate. The court did take note of the warning in *Gingles* that undue evidentiary weight ought not be given to elections characterized by "special circumstances, such as the

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[5] It should also be noted that, although the question of whether the court of appeals erred in discounting evidence relating to the exogenous elections may be considered to be fairly included within the questions presented in the petition, see Sup. Ct. R. 14.1(a), it is not in terms advanced by petitioners.

minority candidate running unopposed." 478 U.S. at 51. But, as the court of appeals points out, "*Gingles* clearly does not establish a *per se* rule against consideration of such evidence; it does caution against foreclosing claims on that basis alone." Pet. App. 13. In this case, this factor alone apparently was not used to foreclose petitioners' claim (*ibid.*), since the court relied as well on the results in several Anglo-Anglo elections, the influential role of Hispanics in the plurality political party in Saguache County, and the extremely narrow defeat of Hispanic candidates in two elections. Thus, the court of appeals' limited consideration of unopposed victories by Hispanic candidates appears not to depart from the standards set out in *Gingles* or in decisions of any other court of appeals.

b. Both courts below relied in part on the results of three Anglo-Anglo elections in which they found that the winning candidate was supported by the Hispanic community to conclude that there was no pattern of Anglo bloc voting sufficient to lead to usual defeat of the Hispanic candidate of choice. In *Gingles*, this Court was divided on the general issue of the relevance of the race of the candidate in Section 2 analysis. Justice Brennan's opinion, joined by three other Justices, concluded that "the race of the candidate *per se* is irrelevant to racial bloc voting analysis." 478 U.S. at 67.[6] Justice White expressed the view that race would be relevant under some circumstances, *id.* at 83. Four other Justices stated that the view that the race of the candidate is always irrelevant was contrary to precedent and did not

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[6] The Court had noted earlier, however, that among the factors in a Section 2 case is "the extent to which minority group members have been elected to public office in the jurisdiction." 478 U.S. at 48 n.15 (internal quotation marks omitted). Indeed, Section 2(b) itself provides that "[t]he extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered." 42 U.S.C. 1973(b).

have to be decided in that case. *Id.* at 101 (O'Connor, J., concurring in the judgment). Since *Gingles*, the Court has not had occasion to revisit this question.

The issue of the relevance of the candidate's race arises, *inter alia*, where the defendant has attempted to show that, although the minority community has not been able to elect minority candidates, it has achieved success because it has supported nonminority candidates who won in elections in which they ran against other nonminority candidates. To foreclose a Section 2 claim simply because of such victories by nonminority candidates would threaten to reduce Section 2 "to provid[ing] minority groups the ability to participate equally in the electoral process and to have the opportunity to elect representatives *only* if those candidates are white." *East Jefferson Coalition for Leadership & Development* v. *Parish of Jefferson*, 691 F. Supp. 991, 1001 (E.D. La. 1988). On the other hand, just as the rule cannot be that minorities may elect candidates of their choice so long as those candidates are nonminority, so too it cannot be the rule that only minority candidates can be the candidates of choice for minority groups.

The courts of appeals have generally recognized—and the United States has consistently argued—that evidence concerning elections in which no minority candidate ran is insufficient to rebut a clear pattern of lack of electoral success in elections in which a minority candidate was in the field. *E.g.*, *Campos* v. *City of Baytown*, 840 F.2d 1240, 1244-1245 (5th Cir. 1988), cert. denied, 109 S. Ct. 3213 (1989); *Smith* v. *Clinton*, 687 F. Supp. 1310, 1316-1317 (E.D. Ark.), aff'd, 109 S. Ct. 548 (1988). Cf. *Citizens for a Better Gretna* v. *City of Gretna*, 834 F.2d 496, 502-504 (5th Cir. 1987) ("That blacks also support white candidates acceptable to the majority does not negate instances in which white votes defeat a black preference."), cert. denied, 109 S. Ct. 3213 (1989).

There is, however, no direct conflict between the decision below and the results in *Baytown* or *Gretna*. Both courts below found that the winning candidate in each of three Anglo-Anglo races received considerable electoral and other support from the Hispanic community. Pet. App. 18, 24. Thus, the decision in this case does not necessarily conflict with *Baytown*, where the Fifth Circuit based its decision in part on the fact that it found "no evidence that any Anglo-Anglo race * * * offered the voters the choice of a 'viable minority candidate.' " 840 F.2d at 1245. Nor does the decision conflict with *Gretna*, where the elections actually at issue were races for multiple seats in which black *and* white candidates ran. Unlike here, the question for the *Gretna* court was whether winning white candidates could be considered candidates of choice of the minority community when a black candidate with greater black support lost.

Nor can it be concluded that the result in this case is at odds with the district court decision in *Smith*. The *Smith* court found that the evidence concerning elections in which blacks ran against whites was "so strong" that it could not be overcome even by evidence that "white candidates preferred by black voters sometimes win in elections involving only whites." 687 F. Supp. at 1317. In contrast, the Tenth Circuit found that the evidence of defeat of Hispanic candidates by Anglo candidates was not strong in this case, noting in various places in its opinion that, *inter alia*, two of the three general elections for county commissioner analyzed by petitioners were quite close (with the Hispanic candidate losing by 22 and 53 votes), that there was evidence of Hispanic success in electing unopposed candidates, and that Hispanics were the dominant force in the plurality political party.

In view of these factors, it cannot be said that the court used evidence that Hispanic-supported Anglo candidates had defeated other Anglo candidates in Anglo-Anglo elec-

tions to foreclose an otherwise proven Section 2 claim. The decision of the court of appeals is thus generally in accord with the tacit acknowledgement of other courts that evidence concerning elections in which no minority candidate ran can be relevant in appropriate circumstances. In any event, the Tenth Circuit's decision could be read as departing from this consensus only on the assumption that petitioners had shown a clear pattern of defeat of Hispanic candidates by Anglo candidates. Neither court below believed that petitioners had succeeded in making such a showing. The question whether both courts below erred in this respect is uniquely tied to the particular facts of this case, and does not warrant review.[7]

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[7] Respondents' argument that they cannot be sued to enjoin continued use of the at-large system of electing county commissioners – even if the system violated the Voting Rights Act – appears not to be substantial. Br. in Opp. 3-5. The Voting Rights Act expressly provides that no improper "standard, practice, or procedure shall be imposed *or applied* by any State *or political subdivision*." 42 U.S.C. 1973(a) (emphasis added). Respondents, who are plainly officers of a "political subdivision," do not argue that they are not responsible for "applying" the at-large voting system by administering elections in the county. Insofar as is revealed in the reported decisions, virtually all of the cases challenging state-mandated local electoral practices have been suits against local officials. See, *e.g.*, *Rogers* v. *Lodge*, 458 U.S. 613 (1982); *City of Mobile* v. *Bolden*, 446 U.S. 55, 58 (1980); *Kramer* v. *Union Free School Dist. No. 15*, 395 U.S. 621 (1969); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). In the only reported case in which the issue raised by respondents has been squarely addressed, the Eleventh Circuit dismissed respondents' argument in a footnote. *United States* v. *Dallas County Comm'n*, 739 F.2d 1529, 1532 n.1 (11th Cir. 1984). Cf. *Ex parte Young*, 209 U.S. 123 (1908).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1989

JENNIE SANCHEZ, et al.,

Petitioners,

v.

WILLIAM BOND, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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PETITIONERS' SUPPLEMENTAL BRIEF

This Supplemental Brief responds to the Solicitor General's Brief for the United States as Amicus Curiae.

STATEMENT

The Solicitor General misstates the issue before the Court. The questions here are whether the District Court and the Court of Appeals for the Tenth Circuit appropriately discounted petitioners' unrebutted voting analyses, based solely on the anecdotal testimony of one lay witness, and whether petitioners' unrebutted proof of

racially polarized voting together with continual Hispanic electoral defeat can result in holding that Hispanic preferred candidates were not defeated by Anglo bloc voting based solely on the election more than twenty years ago of unopposed Hispanic candidates and on the election of Anglo Democrats.[1] When the Solicitor General focuses on these particular questions, he agrees with petitioners that such reliance is improper.

First, as to political cohesiveness the Solicitor General agrees with petitioners: "In the presence of an unrebutted statistical showing that the minority community votes as a bloc, it is difficult to see how anecdotal testimony of the sort at issue here from a single lay witness could be sufficient to support a finding of lack of political cohesion." A.C. 10.

Second, as to the defeat of the Hispanic's preferred candidates by Anglo voters, the Solicitor General again agrees with petitioners: "the courts of appeal have generally recognized – and the United States has consistently argued – that evidence concerning elections in which no minority candidate ran is insufficient to rebut a clear pattern of lack of electoral success in elections in which a minority candidate was in the field." [citation omitted] A.C. 14.

Nevertheless, in order to justify his recommendation, the Solicitor General frames both issues around whether the lower courts' factual determinations were clearly erroneous. Even on this score, the Solicitor General cannot

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[1] The Solicitor General recognizes that these issues framed the basis of the rulings below. Brief of the Solicitor General for the United States as Amicus Curiae at p. 5, (hereinafter A.C. ___).

escape the reality that the District Court and Court of Appeals allowed evidence which this Court has identified as being of limited value to overcome entirely unrebutted facts which the Court has identified as determinative of vote dilution issues. *Thorburg v. Gingles*, 478 U.S. 30, 50-51, 106 S.Ct. 2752, 92 L.Ed. 2d 25 (1986) (*Gingles*).

DISCUSSION

1. Cohesiveness

The Solicitor General concludes that the decision of the Court of Appeals for the Tenth Circuit in affirming the District Court's findings of lack of cohesion in the Hispanic community of Saguache County does not depart so clearly from the consensus of the courts of appeals on the correct legal standards that it creates a conflict among the circuits requiring resolution by this Court. A.C. 12.

The Solicitor General's conclusion is undermined by his own recognition under applicable legal principles that: 1) a determination of cohesiveness cannot be made apart from a study of the analysis of racial bloc voting, 2) lay witness testimony is insufficient to overcome unrebutted statistical evidence of cohesiveness, and 3) the exclusion of consideration of voting behavior analysis in exogenous elections is erroneous. A.C. 9-11.

In allowing that the Tenth Circuit's reliance on the testimony of a single lay witness to counter unrebutted statistical evidence of minority voter cohesiveness presented by petitioners "may have been appropriate," the Solicitor General presumes a weakness in petitioners'

statistical evidence. A.C. 10. That weakness he subsequently explains resulted when petitioners failed to include analysis of Anglo versus Anglo elections and included only the small sample of the three County Commission elections in which Mexican American candidates ran. A.C. 10-11. However, the Solicitor General also subsequently recognized that the omission of Anglo versus Anglo elections should not have been regarded as a determinative factor[2] and the seven exogenous county-wide election analyses presented as evidence by petitioners should have been included and not discounted in the analysis of political cohesiveness. A.C. 11. Despite these specific acknowledgements and without any authority, the Solicitor reached the conclusion that where statistical evidence is found to be "weak," testimony from a single lay witness could indeed be sufficient to support a finding of lack of political cohesiveness. A.C. 10. These conclusions of both courts below and the Solicitor General are contrary to the Supreme Court and other appellate court holdings.

Where statistical data is limited because the minority community has only recently and limitedly begun sponsoring candidates, the lack of numbers of elections available for analysis should not be used against the minority community. *Gingles*, 478 U.S. at 57, n. 25. Exogenous

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[2] See p. 6, *infra*. In fact, the Solicitor General pointed out that the findings of both courts below that the three successful Anglo Democratic commissioner candidates were the "candidates of choice" of the Hispanic community " . . . strongly suggests Hispanics do vote as a bloc . . . " directly contradicting the findings of those courts that Saguache County Hispanic voters are not politically cohesive. A.C. 10.

elections which can demonstrate the actual voting behavior in the jurisdiction should be considered and are probative in the determination of racially polarized voting, thus political cohesion. *Solomon v. Liberty County*, 865 F.2d 1566 (11th Cir. 1988) (*Solomon*); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 109 S.Ct. 3213 (1989) (*Gretna*). Exclusion or disregard of such evidence is error. *Solomon*, 865 F.2d at 1578; *see also Carrolton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987); *Smith v. Clinton*, 687 F. Supp. 1310 (E.D. Ark. 1988), *aff'd*, 109 S.Ct. 548 (1988) (*Smith*). The Solicitor General's gratuitous comments that the weight to be given such evidence varies from case to case is an effort to detract from the clear error committed by the Tenth Circuit and District Court in their dismissal of such evidence, describing behavior of the identical universe of voters. Clearly in this case the facts compel the inclusion, not the exclusion of exogenous elections because of the limited number of direct elections available for analysis and the weight given the evidence should be probative, not limited. Any lesser consideration of evidence contravenes *Gingles*. Petitioners' evidence of racially polarized voting thus political cohesiveness, with the inclusion of the exogenous elections, is without question both strong and unrebutted.

Regarding the lower courts' reliance on the elevation of the anecdotal testimony of a single lay witness as more probative than statistical analysis of actual voter behavior in determining the existence of political cohesiveness of the Saguache minority community, the Solicitor General recognized that the finding is insufficiently supported. A.C. 10 (". . . the opinion of the court of appeals may well be mistaken.") Yet, without reference to authority, the Solicitor General attempts to create an exception to the

unequivocal rule in the Ninth and Fifth Circuits when he allows that where unrebutted statistical evidence is characterized as "weak" by the district court, then contradicting anecdotal evidence may be considered more probative.

Recently the Ninth Circuit determined that actual patterns of voting behavior established by statistical evidence cannot be contradicted by anecdotal evidence of differences in the minority community. *Gomez v. Watsonville*, 863 F.2d 1407, 1416 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 1534 (1989) (*Gomez*). Once racially polarized voting is established through statistical evidence, the requisite political cohesiveness of the minority group is conclusively established. *Gomez*, 863 F.2d at 1416; *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988), *cert. denied*, 109 S.Ct. 3213 (1989) (*Baytown*). In this case both courts below accepted the anecdotal evidence of a single lay witness as sufficient to overcome the unrebutted statistical evidence. That the statistical evidence was limited by the number of elections available for analysis does not detract from its superior probative value. *Solomon*, 865 F.2d at 1578. *Gretna*, 884 F.2d at 502. The "weaknesses" found in the petitioners' statistical data was directly attributable to erroneous exclusion of exogenous elections by the lower courts. Despite the reduction of petitioners' statistical data by the lower courts to only three elections, that data remains the unrebutted evidence of actual voting patterns and is unqualifiedly more reliable than, and of superior probative value, to anecdotal testimony of one lay witness in demonstrating existence of political cohesiveness. *Gomez*, 863 F.2d at 1416. The Solicitor General's reasoning that the Tenth Circuit may have appropriately accepted such evidence as conclusive is a sleight of hand

effort to mask the clearly erroneous application of law by the Tenth Circuit.

2. Ango Bloc Vote

The Solicitor General concludes on the question of whether the courts below erred with respect to the correct standard to be applied in determining whether a sufficiently large Anglo bloc vote that usually defeats Hispanic preferred candidates exists in Saguache County is uniquely tied to the facts of this case and therefore does not warrant review here. A.C. 16.

The Solicitor General's conclusion is completely at odds with his own analysis of the legal principles applied by the courts below on this issue. The Solicitor General recognizes that the Court of Appeal's holding that petitioners had not shown a pattern of racially polarized voting and Anglo bloc voting sufficiently large to defeat Hispanic preferred candidates had two primary bases: the election of unopposed Hispanics, and the election of three Anglos argued to be candidates of choice of the Hispanic community. A.C. 12.

a) Regarding the reliance of the Tenth Circuit on the fact that some unopposed Hispanics more than twenty years ago had secured election, the Solicitor General recognizes that this Court has warned against giving undue evidentiary weight to just such evidence. A.C. 12. Yet, without explanation and without authority the Solicitor General concludes that when considered together with active political party participation and near electoral success in two county-wide races, the election of unopposed Hispanic candidates may foreclose petitioners' claim. A.C. 13. Such a conclusion runs contrary to this Court's decision in *Gingles*, 478 U.S. at 51.

Gingles explicitly establishes that minority candidates running unopposed is a special circumstance that cannot undermine a showing of consistent electoral defeat of minority preferred candidates by an Anglo voting majority. *Id.* This Court did not qualify the special circumstance described above by stating that such unopposed election may have more weight if accompanied by continual electoral defeat of minority candidates that *almost* win. The Solicitor General's argument that the clear directive from this Court is lessened by the Hispanic community's active participation in the political process and by the relative close results of two elections defies explanation and certainly lacks authority.

b) Regarding the Tenth Circuit's reliance on the results of three Anglo-Anglo contests, the Solicitor General recognizes the issue of relevance of Anglo versus Anglo candidates arises when "the defendant has attempted to show that, although the minority community has not been able to elect minority candidates, it has achieved success because it has supported non-minority candidates who won in elections . . . against other non-minority candidates." A.C. 14. But as the Solicitor General correctly noted, to accept that concept would threaten to reduce Section 2 "to provid[ing] minority groups the ability to participate equally in the electoral process and to have the opportunity to elect representatives only if those candidates are white." A.C. 14 (quoting, *East Jefferson Coalition for Leadership and Development v. Parish of Jefferson*, 691 F. Supp. 991, 1001 (E.D. La. 1988)). Here both courts below accepted the election of Anglos in Anglo versus Anglo races as sufficient evidence to overcome a clear pattern of lack of electoral success in elections in which a minority candidate was in the field. Those holdings are in direct conflict with: *Baytown*, 840 F.2d at

1244-45; *Gretna*, 834 F.2d at 502-04; and *Smith*, 687 F. Supp. at 1316-17. The Solicitor General's attempt to distinguish this clear authority is feeble at best.

The Solicitor General argues that *Baytown* is distinguished because the Fifth Circuit found "no evidence that any Anglo-Anglo race . . . offered the voters the choice of a 'viable minority candidate.' " A.C. 15. Yet the Solicitor General cannot point to any non anecdotal evidence in the record that the three Anglo candidates he identified as the choice of the minority community were sponsored or supported by minority voters, much less offered the voters the choice of *a viable minority candidate*.[3]

The Solicitor General next argues that *Gretna* is distinguishable because there the elections involved multiple seats with black and Anglo candidates running so that the court could compare the relative level of support from the black community for those candidates. A.C. 15. Yet, here too the evidence shows that when given the choice between an Hispanic and Mr. Allen, one of the three Anglos argued to be a candidate of choice of the minority community, the Hispanic community overwhelmingly chose the Hispanic candidates. T.R. 692-693.

Finally, the Solicitor General argues that *Smith* is distinguishable because the polarization evidence was strong, while here two Hispanic candidates came within 22 and 53 votes of victory. The government has misread *Smith* or has chosen to focus on unrelated points. The

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[3] In fact unrebutted objective statistical evidence in the record on the level of support garnered by one such candidate, Mr. Edwards, shows clearly that he was opposed, not supported by Hispanic voters. PX 54 (72% of Hispanic voters supported Mr. McClure over Mr. Edwards in 1980 and 78% of Hispanic voters supported Mr. Bogle over Mr. Edwards in 1984) (See also: Cert. Pet. at 17 n. 11).

court in *Smith* found strong polarization evidenced by the average support for black candidates from black voters at 89%, but Anglo support at 9%. *Smith*, 687 F. Supp. at 1315. Here the average level of support from Hispanic voters for Hispanic candidates was 87%, and from Anglo voters, 21%. A.C. 3. These levels are comparable in establishing strong polarization. The points of distinction offered by the Solicitor General simply have no foundation. (See also Cert. Pet. at 16 for comparison of polarization levels in *Saguache* and those found in *Thornburg*).

CONCLUSION

The Solicitor General argues that this case does not present issues of sufficient importance to merit the Court's review. A.C. 16. Saguache County has a small population. Yet, the undiminishable truth is that no Mexican American has ever served on the Saguache County commission and no Mexican American has ever won a contested, county-wide election contest in Saguache County.

The Tenth Circuit's affirmance based on factors never before used to decide ultimate questions of political access; (a) a lone lay witness contradicting objective, unrebutted statistical evidence; and, (b) the election of three Anglo candidates as proof of minority political access, will have far reaching effects. The decisions below therefore merit review by the United States Supreme Court.

Respectfully submitted,

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